TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted] 126.

THE TEXAS COMPANY, APPELLANT,

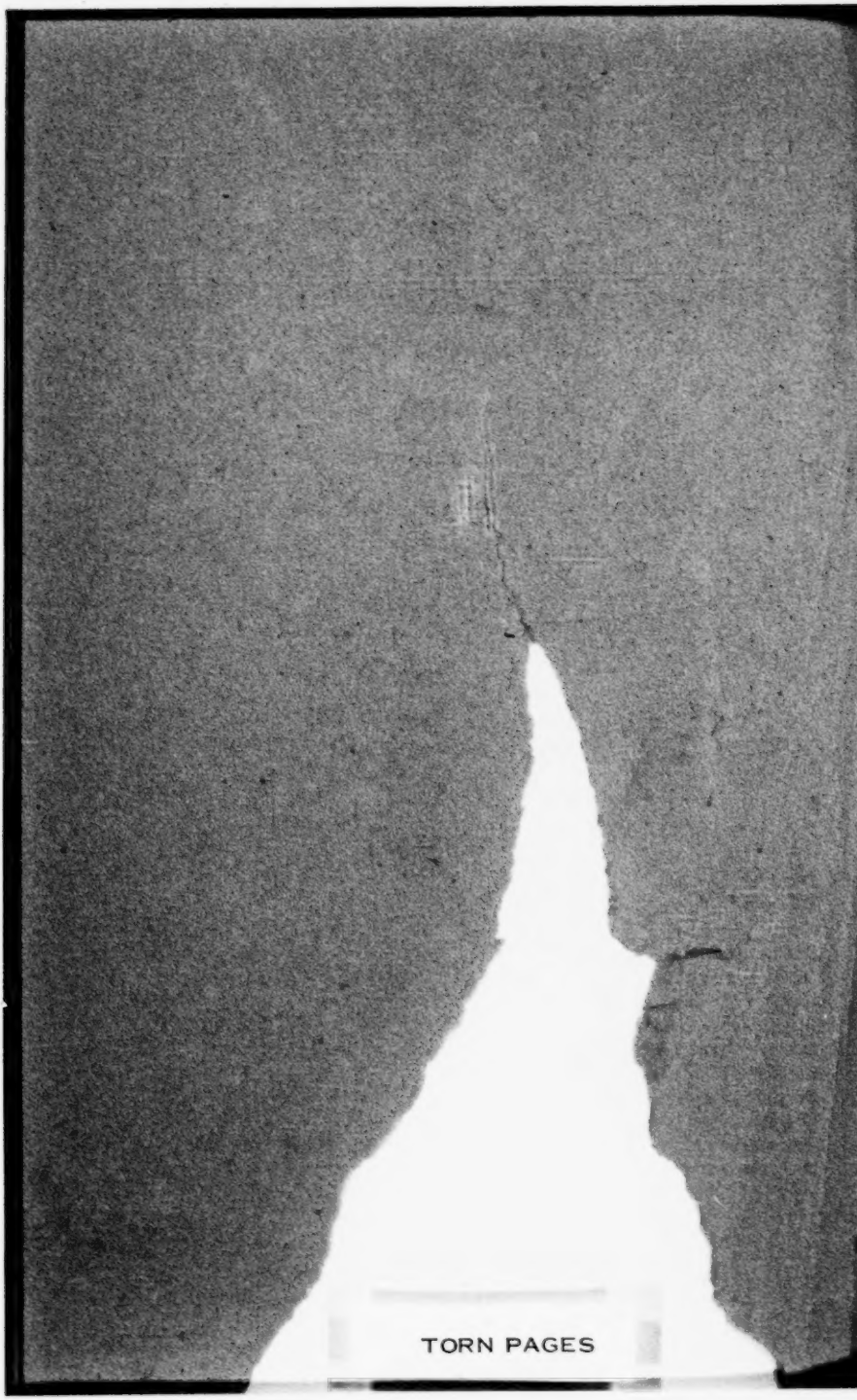
vs.

J. J. BROWN, INDIVIDUALLY AND AS COMMISSIONER OF AGRICULTURE OF THE STATE OF GEORGIA, ET AL.

APPEAL FROM THE [illegible] COURT OF THE UNITED STATES FOR THE [illegible] DISTRICT OF GEORGIA.

[illegible] bill.....
[illegible] to bill.....
[illegible] to bill.....
[illegible] dants.....
[illegible] wer of defendants.....
[illegible] nts to second amendment.....
[illegible] ing order.....
[illegible] aining order.....
[illegible] dants to make bill more specific.....
[illegible] cause to special tribunal of three judges.....
[illegible] ng restraining order.....
[illegible] dence.....
[illegible] ent of evidence.....
[illegible] it of R. M. Ferguson.....

[illegible] ETWEILER (INC.), PRINTERS, WASHINGTON, [illegible]


TORN PAGES

(27,853)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 496.

THE TEXAS COMPANY, APPELLANT,

vs.

J. J. BROWN, INDIVIDUALLY AND AS COMMISSIONER OF AGRICULTURE OF GEORGIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

INDEX

	Original.	Print.
Caption	*a*	1
Bill in equity	1	2
First amendment to bill	22	17
Second amendment to bill	28	22
Third amendment to bill	30	23
Answer of defendants	35	27
Amendment to answer of defendants	51	37
Answer of defendants to second amendment to bill	54	39
Bond for restraining order	60	42
Temporary restraining order	61	43
Motion of defendants to make bill more specific	63	44
Order referring cause to special tribunal of three judges	68	47
Order modifying restraining order	69	47
Brief of evidence	70	48
Statement of evidence	70	48
Affidavit of R. M. Ferguson	71	48

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 14, 1920.

	Original.	Print.
Exhibit "A"—Shipments	75	52
Exhibit "B"—Request for inspection	81	64
Statement of evidence offered by defendants	86	67
Opinion on prayer for preliminary injunction	95	73
Dissenting opinion of Circuit Judge Walker	101	78
Order granting temporary injunction	105	79
Petition for appeal	106	80
Assignments of error	108	81
Order granting appeal and supersedeas	111	83
Supersedeas bond	113	84
Order approving bond	115	86
Original citation and acknowledgment thereon	116	86
Præcipe for record	117	87
Clerk's certificate	119	89

a TRANSCRIPT OF RECORD.

Supreme Court of the United States.

No. 72, Appeals.

THE TEXAS COMPANY, Appellant,

vs.

J. J. BROWN, Individually and as Commissioner of Agriculture of Georgia; W. J. Spear, Individually and as Treasurer of Georgia; M. P. Roane, State Oil Inspector of the Department of Agriculture of Georgia; S. H. Tift, J. E. Hightower, B. A. Crane, Chas. D. Dodd, M. C. Jones, D. R. Bower, Sam E. Brown, J. H. Burson, W. W. Hunt, H. C. McKenizie, C. H. Kittrell, G. W. Herrington, Guy Clopton, G. L. English, S. G. Woodall, J. B. Turner, F. W. Hazelhurst, C. L. Moran, J. M. Williams, Rob't L. Shipp, T. J. Fisher, J. H. Phillips, J. C. Whipple, A. W. Ledbetter, T. G. Perkins, J. E. Johnson, G. W. Heriot, J. N. Doris, J. S. Hopkins, W. L. Fenders, J. M. Gilbert, H. P. Brewer, J. H. Booker, G. B. Meadows, Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Northern Division.

James L. Nesbitt, John M. Slaton, Luther Z. Rosser, Benj. Z. Phillips, Stiles Hopkins, Attorneys at law, Atlanta, Ga., for Appellant.

Brewster, Howell & Heyman, Mark Bolding, Attorneys at law, Atlanta, Ga., for Appellee-.

Clifford Walker, Attorney General of Georgia, Atlanta, Ga.

1 In the District Court of the United States, Northern District of Georgia.

In Equity.

No. 143.

THE TEXAS COMPANY

versus

J. J. BROWN, Individually and as Commissioner of Agriculture; W. J. Spear, Individually and as Treasurer of State of Georgia; M. P. Roane, State Oil Inspector of the Department of Agriculture of the State of Georgia; S. H. Tift, J. E. Hightower, B. A. Crane, Chas. D. Dodd, M. C. Jones, D. R. Bower, Sam E. Brown, J. H. Burson, W. W. Hunt, H. C. McKenzie, C. H. Kittrell, G. W. Herrington, Guy Clopton, G. L. English, S. G. Woodall, J. B. Turner, F. W. Hazelhurst, C. L. Moran, J. M. Williams, Rob't L. Shipp, T. J. Fisher, J. H. Phillips, J. C. Whipple, A. W. Ledbetter, T. G. Perkins, J. E. Johnson, G. W. Heriot, J. N. Dorris, J. S. Hopkins, W. L. Fenders, J. M. Gilbert, H. P. Brewer, J. H. Booker, G. B. Meadows.

Bill in Equity.

To the Honorable Samuel H. Sibley, Judge of the United States District Court, Northern District of Georgia:

The Texas Company files this its bill against the following defendants, being all residents and citizens of the State of Georgia, to-wit: J. J. Brown, individually and as Commissioner of Agriculture of the State of Georgia, a citizen of Elbert County; W. J. Spear, individually and as Treasurer of the State of Georgia, being a citizen of Fulton County, Georgia; M. P. Roane, State Oil Inspecter of the Department of Agriculture of the State of Georgia, being a citizen of Fulton County, Georgia, and the following oil inspectors holding their positions by appointment by the Commissioner of Agriculture, being citizens of the Counties opposite their names and being the inspectors with whom this plaintiff has dealings and in whose territory this plaintiff has offices, to-wit:

S. H. Tift, Albany, Dougherty County.
J. E. Hightower, Americus, Sumter County.
B. A. Crane, Athens, Clarke County.
Chas. D. Dodd, Atlanta, Fulton County.
M. C. Jones, Augusta, Richmond County.
D. R. Bower, Bainbridge, Decatur County.
Sam E. Brown, Brunswick, Glynn County.
J. H. Burson, Carrollton, Carroll County.
W. W. Hunt, Columbus, Muscogee County.
H. C. McKenzie, Cordele, Crisp County.

C. H. Kittrell, Dublin, Laurens County.
G. W. Herrington, Fitzgerald, Ben Hill County.
2 Guy Clopton, Gainesville, Hall County.
G. L. English, Griffin, Spaulding County.
S. G. Woodall, La Grange, Troup County.
J. B. Turner, Macon, Bibb County.
F. W. Hazelhurst, Macon, Bibb County.
C. L. Moran, Milledgeville, Baldwin County.
J. M. Williams, Monroe, Walton County.
Rob't L. Shipp, Moultrie, Colquitt County.
T. J. Fisher, Newnan, Coweta County.
J. H. Phillips, Pelham, Mitchell County.
J. C. Whipple, Quitman, Brooks County.
A. W. Ledbetter, Rome, Floyd County.
T. G. Perkins, Roswell, Cobb County.
J. E. Johnson, Sandersville, Washington County.
G. W. Heriot, Savannah, Chatham County.
J. N. Doris, Savannah, Chatham County.
J. S. Hopkins, Thomasville, Thomas County.
W. L. Fenders, Valdosta, Lowndes County.
J. M. Gilbert, Washington, Wilkes County.
H. P. Brewer, Waycross, Ware County.
J. H. Booker, West Point, Troup County.
G. B. Meadows, Vidalia, Toombs County.

2. Plaintiff shows that the amount involved in this action is in excess of $5,000 exclusive of interest and costs.

3. This controversy mainly arises under the Constitution of the United States and is based upon an alleged unconstitutionality of the laws of the State of Georgia hereinafter referred to and recited and the plaintiff seeks herein both an interlocutory and final judgment suspending or restraining the enforcement, operation and execution of said statutes by restraining the action of the officers of the State of Georgia above named as defendants herein, in the enforcement and execution of said laws.

4. Plaintiff is a corporation duly organized under the laws of the State of Texas and duly incorporated thereunder and residing therein and being a citizen thereof.

5. Plaintiff is engaged in the business of manufacturing, refining, buying and selling petroleum and the products thereof and in such business as selling and offering for sale in the State of Georgia, kerosene oil and gasoline of the character and quality embraced in and made the subject of the provisions of the laws of Georgia set forth in full herein.

6. In and about the conduct of said business by the plaintiff it has brought and is daily bringing into the State of Georgia from Texas and other States of the United States other than the State of Georgia for the purpose of offering for sale and selling the same,

large quantities of kerosene oil and gasoline, meeting the tests required by the laws of Georgia.

3 7. Said products of kerosene oil and gasoline are mainly brought into the State of Georgia by this plaintiff in tank cars containing about 8,000 gallons each and are inspected under the laws herein set out before being emptied therefrom. Plaintiff maintains in the State of Georgia tanks, warehouses, buildings, machinery and other equipment for receiving, shipping, handling, selling and distributing said products shipped as herein stated into the State of Georgia. None of said products can be sold or offered for sale except upon compliance with the laws herein set out.

8. Plaintiff sells in the State of Georgia gasoline brought from without the State approximately one million gallons per month and approximately from six to seven hundred thousand gallons per month of kerosene; such gasoline and kerosene oil meeting the specifications of the law are and will be by your plaintiff sold and offered for sale to purchasers in the State of Georgia, both retail and wholesale.

9. The business conducted by plaintiff therefore constitutes interstate commerce, all of the aforesaid products being brought from points without the State of Georgia into the State of Georgia as stated.

10. Plaintiff has invested a large amount of money in plants and equipment at its various places of business in the State of Georgia for the conduct of its business of offering for sale and selling in the State of Georgia, kerosene oil and gasoline and intends in the State of Georgia to continue the conduct of said business in strict compliance with the laws of the State of Georgia insofar as such laws may be valid and constitutional and in such conduct of its business will continue to offer for sale large quantities of gasoline and kerosene oil, meeting the specifications as to standard and quality and any other specifications required by the provisions of the laws of Georgia.

4 11. Plaintiff shows that all of the gasoline and kerosene oil which it is selling and has on hand and will sell in the future, now meets with and will meet with the specifications fixed by the inspection laws of Georgia hereinafter referred to and that practically all the gasoline, kerosene and other petroleum products which are sold in the State of Georgia by dealers in such commodities in the State of Georgia, meet with the specifications and requirements fixed by the inspection law of Georgia and that in point of fact the specifications so fixed by such inspection law of the State of Georgia are such that practically all commercial gasoline and kerosene oil and other liquid motor fuels or petroleum products come within the standards and meet the specifications so fixed.

12. Plaintiff avers that its real objection to a compliance with the provisions of said inspection law is compliance with that provision thereof which exacts a fee for the inspection therein provided largely disproportionate to and in excess of the cost of the inspection.

13. Plaintiff shows that the law of Georgia dealing with the inspection of oils is to be found in the Code of Georgia of 1910 which with the pertinent amendments thereto are herein set forth:

1800. Appointment of Inspectors.—It shall be the duty of the Commissioner of Agriculture of this State to appoint an inspector of oils at Atlanta, Savannah, Augusta, Macon, Columbus, Rome, Newnan, Brunswick, Americus and Athens.

1801. Terms of Office and Clerks.—Each of said inspectors of oil shall hold his office for two years from the date of his appointment, unless sooner removed by the commissioner of agriculture for incompetence, malfeas*nace*, or other sufficient cause. If any vacancy shall occur in any of the offices of inspectors of oils, the vacancy shall be filled by the commissioner of agriculture for the unexpired term. Said inspectors shall be authorized to appoint such clerks or deputies, with consent and approval of the commissioner of agriculture, as they may find requisite to the perfect carrying out of the laws of this State in reference to the inspection of oils, but each inspector shall be responsible for the perfect and proper performance of all the duties of his office, and shall pay his clerk or deputy out of the compensation provided for himself.

1802. Board of Inspectors.—Each of said ten inspectors of oil, immediately after his appointment and before entering upon his duty as inspector, shall give bond in an amount to be fixed by the commissioner of agriculture. Said bond shall be conditioned for the faithful and prompt accounting with the treasurer of the State for all moneys received by him and his deputies as fees for inspecting illuminating oils and other fluids that shall be paid into the treasury. This bond shall be made payable to the Governor and shall be signed by the said inspector and sureties, and approved by the commissioner of agriculture.

1803. Compensation.—All inspectors shall receive compensation as follows: Said inspectors shall remit to the treasurer each month, at the time of making their monthly statements, one-third of all the fees received by them in excess of twenty-five dollars per month: Provided, that when any inspector's receipts for a month shall, under the operation of this section be such that two-thirds thereof shall exceed one hundred and twenty-five dollars, he shall remit to the treasurer all of said receipts in excess of said amount of one hundred and twenty-five dollars, less five per cent. Each inspector shall keep a record of the amount of oils inspected, with the name of the person, corporation, or firm for whom said inspection is made, and also all the moneys received by him for said inspection, and he shall forward monthly reports on the first day of each month, containing an abstract from said record for the month preceding, to the commissioner of agriculture, and shall at the same time forward to the treasurer of the State all the moneys received by him as fees during that time, except what he is entitled to retain as his compensation. Said reports

shall give the name of the inspector, or deputy, who inspected each lot of oil.

6 1804. Fees.—The following shall be the legal schedule of fees for official inspection of oils in this State: For inspecting lots of four hundred gallons and upwards, one-half cent per gallon; for inspecting in quantities of more than two hundred and less than four hundred gallons, one cent per gallon; for inspecting in quantities of less than two hundred gallons, one and one-half cents per gallon. There shall be no difference of charges in cases where the oil inspected is in barrels from charges where the oil is in bulk.

1805. Additional Inspectors.—The commissioner of agriculture shall appoint inspectors at such other places in this State, in addition to the ten provided for, as in his judgment may be proper and necessary to insure the inspection of oils throughout the State. These additional inspectors may be appointed at any time when the commissioner of agriculture shall find that a necessity for said inspectors, or any of them, exists; they shall hold their office for the same time, and subject to the same conditions and duties as inspectors hereinbe-ore provided for: Provided, that the compensation and bond of said inspectors shall be fixed in the same manner as in case of the ten inspectors provided for.

1806. Territory of Inspectors.—Each of the said inspectors appointed under the terms of this Article shall by themselves or their deputies, respond to all calls and demands for the inspection of oil from places within thirty miles of the town or city for which they were appointed. The mileage and traveling expenses allowed the inspectors under this Article need not be accounted for in their monthly statements, but are in the nature of extra compensation allowed said inspectors for making inspections.

1807. Inspection in Bulk.—In all cases where oil is inspected in bulk, before said oil is put into barrels, it shall be the duty of the inspector to either see the oil so inspected put into barrels on which he has placed his official brand, or else he shall again take samples from among the barrels into which said bulk oil has been unloaded before he shall place his official brand upon said barrels. In his discretion, the official inspector may refuse to inspect oil in bulk, and require the owner or dealer in oils to put said oil into barrels or other packages for retail trade, before he will accord it an official in-
7 spection: Provided, always, that no official inspection of bulk oils shall be made at any place in this State except where said bulk oils are to be unloaded and put in barrels or other packages for retail trade.

1808. Use of Official Brands.—The official brand used by the inspectors of oils shall in no case be used for branding barrels or cases of illuminating oils by any other person than the regularly appointed inspector, or his deputy. In no case shall an inspector be a dealer in oils, or be in the employ of a dealer in oils, or have as his deputy any person dealing in oils or in the employ of any person or corporation so dealing in oil. Whenever any person designing to have oil in-

spected he shall, at the time of sending the order for inspection to the inspector, send a duplicate of the order to the commissioner of agriculture.

1919. Test of Oils.—No person shall manufacture or have in his possession to sell, or give away for illuminating or heating purposes in lamps or stoves within the State, any oil or burning fluid, wholly or partly composed of nap-tha, coal oil, petroleum, or products thereof, or of other substances or materials, emitting an inflam-able vapor which will flash at a temperature below 100 degrees Fahrenheit, when tested in the closed oil tester, known as the New York State or Elliott Oil Tester, according to the following formula, to-wit: Fill the water bath with fresh well or hydrant water up to the lead mark on the inside. Then immerse the oil cup in the water and pour in oil so as to fill the cup up to within one-eighth of an inch of the plunge. Take a piece of blotting paper and remove all air bubbles from the surface of the oil by lightly touching them with the paper. Next, carefully, with a dry towel or cloth, wipe the upper inner parts of the oil cup so as to remove any drops of oil that might have spattered on the upper part of the cup. Then put on the glass cover of the oil cup, pass thermometer through the hole in the cork to such a point that the mercury bulb will just be covered by the surface of the oil. Next light the lamp and introduce it under the water bath: so adjust the flame that the temperature will rise at the rate of two degrees a minute. Wait until the temperature reaches 99 de-
8 grees F., then light a wooden toothpick and pass the flame through the semi-circular opening in the glass plate half way between the oil and the cover, and to a distance about half way between the oil and the cover. The motion should be steady and uniform, rapid and without pause. The appearance of a slight bluish flame shows that the flashing point has been reached. If the oil flashes at this point, it should be branded: "State of Georgia, Rejected." If it does not flash at this point, it should be branded: "State of Georgia, Approved." Naphtha and other illuminating products of petroleum, which will not stand the flash test required by this section, may be used for illuminating or heating purposes in the following cases:

1. In street lamps and open-air receptacles, apart from any buildings, factory or inhabited house in which the vapor is burned.

2. In dwellings, factories, or other places of business when vaporized in secure tanks of metal generators made for that purpose, in which the vapor so generated is used for lighting or heating.

3. For use in the manufacture of illuminating gas in gas manufactories, situated apart from dwellings and other buildings.

The inspector shall provide at his own expense instruments for testing oils and stencils for branding packages, to read thus: "State of Georgia, Approved." With the name of inspector and date of inspection. The inspector should brand all oils and fluids falling below 100 degrees, flash test, in the Elliott Tester, "State of Georgia,

Rejected." With the name of the inspector and date of inspection. If the inspector shall find any illuminating oil or fluid under the flash test required by law, or fals-ly branded, he shall cause the offender to be prosecuted.

4. When oil inspected shall stand a higher test, the inspector shall designate the same by his brand.

5. Inspec-ors, or other sworn clerks, or deputies, may enter any place where oils or illuminating fluids are kept for sale or consumption in this State, and may reinspect any fluid which he has reason to suspect is below the standard. But no fee shall be charged for re-inspection.

6. Any person selling oil in violation of this section, in addition to the penalty prescribed in the Penal Code, shall be liable to any person who shall sustain damage to property or person by reason thereof: Provided, reasonable prudence was used by the party injured while handling the fluid.

7. Inspectors shall inspect from time to time oil in the tanks of retail dealers, whether previously inspected or not; and if the fluid is below the standard, the same shall be seized, and, after ten days' notice, be sold for redistillation only. Proceeds, after deducting necessary expense of sale, notice, and seizure, shall be turned over to the school fund of the county in which the seizure is made.

1810. General Inspection of Oils.—It shall be the duty of the commissioner of agriculture to appoint a general inspector of oils for the State, whose duty shall be to go from point to point about the State at the direction of the commissioner of agriculture to inspect such oils as may be desired, instruct the local inspectors in the art of testing fair, correct, and impartial samples of oils for illuminating purposes and to test the same, under the provisions of this Article, to check up all accounts and books of account of local oil inspectors, and to see that said moneys due the State from fees paid from oil inspections are paid into the State Treasury, and to see that said local oil inspectors fairly, correctly, and impartially discharge the duties imposed upon them by law, and perform such other duties as may be prescribed by the commissioner of agriculture.

1811. Salary of General Inspector.—The general inspector shall be paid a salary not to exceed one hundred dollars per month, and actual and necessary traveling expenses, while in the discharge of his duties and said salary and traveling expenses shall be paid out of the fees collected from oil inspection: Provided, however, that this shall not be in conflict with other sections of the Code, providing for the appointment and compensation of local oil inspectors.

1812. State Chemist's Decision Final in Cases of Dispute.—Whenever complaint is made to the department of agriculture in regard to the illuminating qualities of illuminating oils sold in this State, it shall be the duty of the general inspector of oils to secure sample of such oil complained of, which shall be turned over

to the State chemist, who shall thoroughly analyze and test said oil with reference to its illuminating quality. If, after analyzing and testing said oil, the State chemist shall decide, that although the oil is safe, it is yet of inferior illuminating quality, then the general inspector on receipt of the State chemist's report, shall brand such oil "State of Georgia, Rejected, Quality inferior," with his name and date of inspection. The State chemist is hereby constituted the referee, whose dicision shall be final in all cases of disrepute regarding oils.

1813. Penalties Apply to Oils of Inferior Quality.—The same penalties applying to oils which fail to meet the flash test of the State of Georgia shall also apply to oils of inferior illuminating quality.

1814. Duty of General Inspector to Prosecute.—It shall be the duty of the general inspector of oils to prosecute violators of the provisions of this Article, and all fines arising from such prosecutions shall becamе a part of the general educational fund of the State.

14. Said Code sections were amended by the Legislature of Georgia as set forth in the Acts of 1912, as follows:

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, That Section 1800 of the Code of Georgia of 1910 be, and the same is hereby amended by striking out all of said Section after the word "appoint" in the third line thereof, and inserting in lieu thereof the following words: "ten Inspectors of oils; provided, this Act shall not be construed to repeal Section 1805 of the Code of Georgia, which gives the Commissioner of Agriculture discretion to appoint additional Inspectors. Inspectors of oils shall remit to the Treasurer each month, at the time of making their monthly statements, all fees received by them,
11 except that they may retain as compensation for their services the sum of ten dollars per car for oil inspected, and for small barrel lots inspected, they shall receive all fees received until same exceeds ten dollars per month, and one-half of said fees received for inspecting small barrel lots less than car loads, thereafter, during the same month, the total amount of compensation received for inspecting oils and gasoline and all other services of every character, not to exceed one hundred dollars per month. Each inspector shall keep a record of the amounts of oils inspected with the name of the person, corporation or firm for whom said inspection is made, and also all moneys received for said inspection, and he shall forward monthly reports on the first day of each month to the Commissioner of Agriculture, and he shall at the same time forward to the Treasurer of the State the moneys received by him as fees during the time, except what he is entitled to retain as his compensation. Said reports shall give the name of the Inspector or Deputy who inspected each lot of oil."

Sec. 2. Be it further enacted by the authority aforesaid, that the provisions of Section 1803 of the Code of Georgia, 1910, prescribing

the compensation of the Inspectors of oils, conflicting with this Act be, and the same are, hereby repealed.

Sec. 3. Be it further enacted by the authority aforesaid, That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

15. Also in the Acts of 1912 of the Legislature of Georgia, pages 149 to 152 inclusive, which are as follows:

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by the authority of the same, That after the passage of this Act it shall be the duty of all inspectors of illuminating oils to inspect all gasolines, benzines and naphthas sold or offered for sale in this State.

Sec. 2. Be it further enacted by the authority aforesaid, That all inspectors shall receive the same compensation for inspecting gasolines, benzines and naphthas as is provided for in the inspection of illuminating oils. Each inspector shall keep a record of the
12 amount of gasolines, benzines and naphthas inspected, with the name of the person firm or corporation for whom said inspection is made, and also all the moneys received by him for said inspection. He shall also forward monthly reports on the first day of each month to the Commissioner of Agriculture and shall at the same time forward to the Treasurer of the State all moneys received by him as fees during that time except what he is entitled to retain as his compensation. The entire compensation of any inspector, including all services rendered the State, shall not exceed one hundred dollars per month.

Sec. 3. Be it further enacted by the authority aforesaid, That for the purpose of this Act, gasolines, benzines and naphthas shall be deemed to be subject to the same supervision and control as is now provided for illuminating oils, except that the inspectors are not required to test them other than to ascertain their specific gravity at 60 degrees Fahrenheidt, and it shall be unlawful for any manufacturer, dealer or vender, to sell, offer for sale or keep in storage any petroleum product known as gasoline, benzine or naphtha, unless he shall label any casks, barrels or packages containing such product with figures denoting their gravity and the words "Gasoline," "Benzine," or "Naphtha" in large red letters at least one and one-half inches in size. Provided, that this requirement as to labeling shall not apply to car tanks, storage tanks or delivery wagons.

Upon failure to comply with the foregoing provisions, the offending person shall — deemed guilty of a misdemeanor and upon conviction thereof, shall be punished as proscribed in Section 1065 of the Code of Georgia, and if any manufacturer, vender or dealer shall adulterate any gasoline, benzine or naphtha with any injurious matter or by increasing the bulk thereof by the addition of water thereto, he shall be subject to a like penalty and shall be further liable to any party who may be injured for any resultant damages, to be recovered in a civil action.

13 Sec. 4. Be it further enacted by the authority aforesaid, That the following shall be the legal schedule of fees for official inspection of gasolines, benzines and naphthas in this State: For inspecting lots of four hundred gallons and upwards, one-half cent per gallon; for inspecting in quantities of more than two hundred and less than four hundred gallons, one cent per gallon; for inspecting in quantities of less than two hundred gallons, one and one-half cent per gallon. There shall be no difference of charges in cases where the oil inspected is in barrels from charges where the oil is in bulk. The fees herein prescribed shall be paid by the owners of the gasolines, benzines and naphthas at the time inspections are made.

Sec. 5. Be it further enacted by the authority aforesaid, That every person dealing at retail in gasolines, benzines and naphthas in this State, shall after the first day of January 1913, deliver same to the purchaser only in barrels, casks, cans or packages designated by labels securely pasted or attached thereto with the words "Gasoline," "Benzine," or "Naphtha," "Dangerous," "Inflammable," printed in bright red ink; provided, however, that this Section does not apply to tank wagons, or to car tanks or storage tanks. Nothing in this Section shall prevent dealers from delivering gasoline by pumping or pouring same into automobiles.

Sec. 6. Be it further enacted by the authority aforesaid that no dealer shall deliver kerosene in barrels, casks, cans or packages stenciled as set forth in Section 5 of this Act.

Sec. 7. Be it further enacted by the authority aforesaid, That any person violating the provisions of Sections 5 and 6 of this Act shall be punished with a fine of not more than $50.00 (fifty dollars) or imprisonment not to exceed thirty days, one or both, in the discretion of the Court.

Sec. 8. Be it further enacted by the authority aforesaid, That the Commissioner of Agriculture shall cause to be enforced the provisions of this Act, and shall have the authority to make such rules and regulations governing the inspection, sale and storage of gasolines, benzines and naphthas as in his judgment will effectively carry out all provisions of this Act.

14 Sec. 9. Be it further enacted by the authority aforesaid, That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

16. The Penal Code of Georgia, dealing with the subject, covers sections 637 to 642 inclusive and are as follows:

637. Illegal Use of Official Brands.—If any person shall use the official branding devise of the inspector of oils, contrary to (the law) he shall be guilty of a misdemeanor.

638. Duplicate of Request for Inspector.—Whenever a person desires to have oil inspected, he shall, at the time of sending the order

for inspection to the inspector, send a duplicate of the order to the commissioner of agriculture; and for failure to do so, he shall be guilty of a misdemeanor.

639. Illegal Sale of Illuminating Fluids.—Any person who shall sell or offer for sale any of the illuminating fluids designated in Section 1809 of the Civil Code, in violation of the provisions of said section shall be guilty of a misdemeanor.

640. Wrongful Use of Branded Vessels.—Any dealer in illuminating oils or fluids who shall receive, give away, buy, or sell any empty barrels or other packages from which said oil or fluid has been emptied, without first removing or defacing the inspectors' brand, or shall refill such casks or other packages with uninspected oil or fluid for the purpose of sale, and shall sell or offer the same for sale without first having it inspected, shall be guilty of a misdemeanor, the fine, of one be imposed, to be devoted to the public school fund in the county in which the offense is committed.

641. Inspector, Clerk, or Deputy Violating Law.—All clerks and deputies of inspectors are held amenable and subject to the penalties for violating any of the provisions of law regulating the inspection of coal and petroleum oils; and any inspector, inspector's clerk, or deputy, who fails to discharge the duties required of him by said law, or violates the same, shall be guilty of a misdemeanor.

15 642. Sale of Uninspected Oil.—If any person shall sell, or keep for sale or in storage, any crude or refined petroleum, naphtha, kerosene, earth-rock, coal, machine or illuminating oil, the products of petroleum, earth-rock, or coal-oil, without having the same inspected and approved by an authorized inspector, he shall be guilty of a misdemeanor.

17. By the Acts of the Legislature of Georgia of 1919, the salary of the General Inspector was increased from $1,800 to $3,000.00. Said Act, amending section 1811 of the Code of Georgia, makes it read as follows:

"Section 1811. Salary of General Inspector.—The General Inspector shall be paid a salary not to exceed three thousand dollars per annum and actual and necessary traveling expenses while in the discharge of his duties and said salary, traveling and all office expenses shall be paid out of the fees collected from oil inspection; provided, however, that this shall not be in conflict with other Sections of the Code providing for the appointment and compensation of local oil inspectors."

18. Plaintiff shows that for the years 1914 to 1919, inclusive, it paid for the inspection of gasolins and kerosene oil, under the laws herein set forth, the following sums, to-wit:

Year.	Kerosene o.l.	Gasoline.	Total for year.
1914.....	6,018.27	7,772.55	13,790.82
1915.....	7,975.73	13,705.79	21,681.52
1916.....	8,298.89	26,652.29	34,951.18
1917.....	11,260.53	36,019.92	47,280.45
1918.....	15,401.82	51,739.37	67,141.19
1919.....	16,458.02	63,071.53	79,529.55
Total.....	$65,413.26	$198,961.45	$264,374.71

19. Plaintiff shows that from the inspection of products covered by said inspection law during the year 1914, there was placed in the State Treasury exclusive of the fees of the inspectors, the sum of $113,228.29 which was the revenue of the State of Georgia from such inspection fees over and above the fees of the inspectors. The
16 official reports of the Commissioner of Agriculture and the General Oil Inspector establish the correctness of these figures. The official report of the State Treasurer, Hon. W. J. Spear, shows the amount paid to him for such year was $117,461.39; the descrepancy being due to the failure of the Inspectors to report all of their collections to the General Oil Inspector.

20. In the year 1915 the State of Georgia received as revenue in the Treasury of the State from said inspection fees over and above the fees of the inspectors the sum of $127,994.28. The official reports of the Commissioner of Agriculture of the State and the General Oil Inspector and the State Treasurer, establish the verity of these figures.

21. For the year 1916, the State of Georgia received from revenue from such inspection fees over and above the fees of the inspectors, the sum of $166,306.71. The commissions retained by the inspectors were $51,316.48. The correctness of these figures is established by the official reports of the Commissioner of Agriculture, the General Oil Inspector and the State Treasurer.

22. For the year 1917, the net revenue of the State from such inspection fees over and above the fees retained by the Inspectors was $217,378.38. The cost of handling the affairs of the office of the General Oil Inspector, inclusive of the salary of the Inspector was $1,910.70. The correctness of this statement and of these figures is shown by the official reports of the Commissioner of Agriculture, the State Oil Inspector and the official report of the State Treasurer.

23. For the year 1918, there was received into the State Treasury of Georgia as revenue, over and above the fees of the inspectors the net amount of $310,471.19. The correctness of these figures is established by the official reports of the Commissioner of Agriculture, the State Oil Inspector and the State Treasurer, all of said reports referred to in this bill, being made in compliance with the law of the State of Georgia. For the year 1918, the inspectors received for their services exclusive of said amount paid into the State Treasury the sum of $85,167.30.

17 24. For the year 1919, the State of Georgia received into the Treasury after deduction of the fees of the inspectors for the year, the sum of $357,503.76, the same being the net revenue of the State. The amount received by the inspectors for their services was $97,249.02, after the deduction of which, said sum of $357,503.76, was paid into the Treasury as revenue to the State of Georgia.

25. Your petitioner shows that for the year 1919, the official reports of the officers hereinbefore referred to have not been published, but the figures and facts are as stated.

26. Any other expenses, excepting the fees of the oil inspectors, are negligible. The State Chemist is rarely called upon to make tests and then not more than six hours time in the year is required, and the Commissioner of Agriculture whose salary is $5,000 per year, devotes no time to the law because of the Chief Oil Inspector. The stationery, stamps and other incidental expense would not cost $200.00 per year.

27. Plaintiff therefore shows, that after payment of all the expenses of all the inspectors appointed to inspect the products herein set forth and after payment of any other expenses of any other character on account of such inspection, sums far in excess of the cost of inspection are paid into the State Treasury for general revenue purposes, and according to the official report of the General Inspector himself as herein set forth, is from five to six times the amount of the cost of inspection.

28. Plaintiff shows that such charge for inspection in excess of the cost, directly burdens insterstate commerce and is in violaton of the commerce clause of the Constitution of the United States, article 1, section 8, clauses 3 and 17 thereof, and such laws of the State of Georgia is void as being in conflict with the Constitution of the United States, said clauses of the Constitution of the United States providing as follows:

"3. Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

17. To make all laws which should be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

18 29. Plaintiff shows that said fees are disproportionate to the service rendered and include the cost of something beyond legitimate inspection to determine the quality and condition of the product set forth and obstructs the freedom of commerce among the States, constituting an obstruction to and a burden upon that commerce, the exclusive regulation of which is committed to Congress by the Constitution of the United States.

30. Plaintiff shows that when it pays the fees provided by law to said inspectors they subtract their compensation and pay the

balance into the State Treasury from which it cannot be paid out except by act of the Legislature of the State of Georgia, and under the law of Georgia, said State cannot be sued.

31. Plaintiff shows that there are 161 local oil inspectors in Georgia but the ones with which it deals have been set forth herein as defendants to this bill.

32. Plaintiff shows that if it did not pay said inspection fees it would be subjected to unbearable prosecutions and any of its agents who would sell or offer for sale any of its products would be guilty of a misdemeanor punishable under section 1065 of the Criminal Code of Georgia as follows:

1065. Misdemeanors, How Punished.—Except where otherwise provided, every crime declared to be a misdemeanor is punishable by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chain-gang, on the public roads, or on such other public works as the county or State authorities may employ the chain-gangs, not to exceed twelve months, any one or more of these punishments in the discretion of the judge: Provided, that nothing herein contained shall authorize the giving the control of convicts to private persons, or their employment by the county or State authorities in such mechanical persuits as will bring the products of their labor into competition with the products of free labor. If the convict be a female, the judge may, in his discretion, sentence her to labor and confinment on the women's prison
19 on the State farm, in lieu of a chain-gang sentence, not to exceed twelve months: Provided, that the trial judge shall have the discretion also of sending any person convicted of a misdemeanor to the State farm.

33. Plaintiff avers that the law requiring the payment of said fees is in violation of the 14th amendment, section 1, of the Constitution of the United States providing that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and said law violates article 1, section 1, paragraph 3 of the Constitution of the State of Georgia providing that no person shall be deprived of life, liberty or property except by due process of law.

34. The defendants threaten to, unless restrained by this Honorable Court, and will continue to enforce each and all of the provisions of said inspection act set forth and will refuse to accept or brand the illuminating oils, gasoline and kerosene oils shipped by it into the State of Georgia for sale for use and consumption there unless this plaintiff pays the fees prescribed by said laws and unless said fees are so paid, defendants will, unless restrained, institute criminal prosecutions against this plaintiff and will thus subject plaintiff to unjust and oppressive litigation and to a multiplicity of law suits and to the expense incident thereto and to irremediable losses resulting therefrom, and will prevent plaintiff from selling in the State of Georgia its said

products manufactured out of the State and shipped into said State as aforesaid.

35. Said laws offend natural justice and equity in requiring a revenue exaction under the guise of an inspection fee and in imposing unusually severe penalties upon failure or refusal to meet such exaction, all of which is contrary to the Constitution of the State of Georgia as herein set forth and in violation of section 8 of article 1, and in violation of section 10 of article 1 of the Constitution of the United States of America.

36. * * *

37. Plaintiff shows that it has paid its annual license or occupation tax as required by the law of Georgia in acts of 1918 of the Legislature of Georgia, pages 53 and 54.

Wherefore, plaintiff prays that this Honorable Court will make party defendants herein the defendants hereinbefore named and cause subpœnaes to issue from this Honorable Court to each and every one of the defendants, requiring them to appear and answer to this bill in equity, within such time as may be fixed by your Honorable Court, and that upon hearing thereof your Honorable Court will issue an order temporarily restraining the defendants and each of them from proceeding with the enforcement or execution of said inspection law and temporarily suspending or restraining the enforcement, operation or execution of said law by restraining the action of the defendants and each of them in the enforcement or execution thereof and that said temporary restraining order be issued from this Honorable Court forthwith.

That the Hon. W. J. Spear, State Treasurer, be restrained from turning into the treasury of Georgia any of said sums.

That thereafter the judge of this Court call to his assistance to hear and determine the application of plaintiff for a final restraining order in the premises, two other judges as required by the laws of the United States in such cases and set down a hearing thereof at such time as may be fixed by this Honorable Court, upon five days' notice of such hearing, to the defendants and to the Honorable Hugh M. Dorsey, Governor of Georgia and to the Attorney General of the State of Georgia, as provided by statute in such cases made and upon such hearing that this court suspend and restrain the enforcement, operation or execution of said law by restraining the action of the defendants and each of them from the enforcement or execution thereof and that the plaintiff may have such other and further relief in the premises as to this Court may seem just.

JAMES L. NESBITT,
ROSSER, SLATON, PHILLIPS & HOPKINS,
Attorneys for Plaintiff.

GEORGIA,
Fulton County:

Before the undersigned Notary Public in and for said State and County, personally appears J. S. Jones, who upon oath says he is the Superintendent of the Texas Co., in the State of Georgia and is the highest officer thereof in said State, and that the allegations in the above and foregoing petition are true.

J. S. JONES.

Sworn to and subscribed before me this March 17th, 1920.
WM. B. HARTSFIELD,
Notary Public,
Fulton County, Georgia.

My Commission Expires June 9, 1923.

Filed in Clerk's Office 18 day of March, 1920.
[SEAL.] O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy.

Appearance is entered, service acknowledged and all further service waived of the within bill in equity and order thereon for all defendants therein. This March 19, 1920.

CLIFFORD WALKER,
Attorney General.

Filed in Clerk's Office 19th day of March, 1920.
O. C. FULLER,
Clerk,
By G. R. HOOD,
Deputy.

22 *Amendment to Petition.*

The Texas Company, prior to the filing of an answer and within the time permitted by the rules, amends its bill as follows:

1. Petitioner shows that in the year 1906 there was established in Georgia by act approved August 18th, 1906, an Agricultural and Mechanical School for each Congressional District as a branch of the State Educational System, and it was provided that said schools should be maintained from the fees arising from the inspection of oils and fertilizers and all other inspection received by the Department of Agriculture "over the expenses of such inspection and after any portion of said fund otherwise appropriated." Since such time and up to and including the year 1919 by the general appropriation acts there was appropriated to the maintenance of said schools the sum of $10,000 each, said sums to be paid from the inspection of oils

and fertilizers. In 1906 there were 11 such schools and the number of Congressional Districts in Georgia having been increased to 12 in 1911 there were 12 such schools. By the general appropriation act covering the year 1920 the revenues from inspection of oils and fertilizers and other inspection fees were turned into the general fund of the Treasury and direct appropriations were made *of* said Agricultural schools of the sum of $15,000 each.

2. Petitioner shows that the net revenue from all other sources referred to in said Act, excepting the revenue arising from the inspection of oils and gasoline and similar products as shown by the annual reports of the Commissioner of Agriculture, was not sufficient to pay for the maintenance of said schools since 1914.

3. In 1918 the report of the Commissioner of Agriculture J. J. Brown, Esq., on page 20, shows the total expenditure of all divisions of this department mentioned in the report and gives the net balance which said department puts into the Treasury over and above all current expenses:

23 "Paid to Treasurer	$460,672.66
(Fertilizers, Feed and Oils.)	
Received from Treasurer	241,368.60
(Expense of Department of Agriculture, including Bureau of Markets, State Veterinarian, State Chemist and E-tomologist.)	
Balance over	$219,304.06

"These figures speak for themselves and show an overplus accruing from this source and going to increase the revenue of our general State Treasury."

4. Petitioner shows that the business of the sale of kerosene oil and gasoline in the State of Georgia is increasing and will be larger for the year 1920 than for 1919 and the net revenue to the State therefrom will be proportionately larger, and the General Inspector of Oils, M. P. Roane, anticipates the net revenue as set out in the original bill for the year 1920 to be $400,000 from oil inspection fees. Plaintiff is advised and believes that said defendant gave an interview to the Atlanta Journal of the City of Atlanta on March 17th, 1920 and published in that issue of said paper as follows:

"Oil Inspection Fees May Yield Georgia Revenue of $400,000.—The State will receive approximately $400,000 revenue from oil inspection fees if the volume of business during the balance of the year is maintained on its present basis, according to information given out Wednesday from the Department of Agriculture. Last year the revenue from this source was $357,593.76 representing inspection fees on 93,203,672 gallons of gasoline and kerosene shipped into the State. The fees received in February amounted to approximately

$32,000, although the detailed statement has not yet been completed. In February 1919 the oil inspection fees totalled $21,629.64 so that the increase this year is more than one third. The revenue received by the State from oil inspection goes to the support of the district agricultural schools."

5. Petitioner has a growing business and is selling more kerosene oil and gasoline in the State than ever before and according to the requirements of the State, anticipates that it will sell a far
24 larger amount for the year 1920 than heretofore; basing, this estimate both on preceding years and on the increased amount sold during the first months of this year, 1920.

6. Plaintiff shows that no oil, gasoline or kerosene, is produced in the State of Georgia, and unless one has began operating in the last few weeks, there is no operating refinery in Georgia; all of plaintiff's products come from without the State.

7. Plaintiff shows that it shipped directly from points without the State to consumers within the State, the following quantities of kerosene oil and gasoline: on which fees were paid in accordance with said Statute;

Year.	Kerosene.	Gasoline.
1914	92,235 gallons	16,027 gallons
1915	32,251 "	108,859 "
1916	39,138 "	268,741 "
1917	28,057 "	264,839 "
1918	32,282 "	8,210 "
1919	44,481 "	373,044 "
Total	267,444 "	1,039,720 "

8. Plaintiff shows the excessive fees charged as herein set forth violate the Constitution of the State of Georgia, article 7, section 2, paragraph 1, providing that "all taxation shall be uniform upon the same class of subjects ad valorum on all property subject to be taxed within the territoral limits of the authority levying the tax and shall be levied and collected under general laws," and is further violative of article 1, section 10, paragraph 2 of the Constitution of the United States which provides that "no state shall, without consent of the Congress, lay any impost or duties on imports or exports except what may be absolutely necessary for executing its inspection laws and the net products of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of the Congress."

9. Plaintiff shows that the act of 1912 was amended by the General Assembly of Georgia as will be found in the acts of 1913 pages 110 and 111 as follows:

25 *Oil Inspection, Schedule of Fees Amended.*

No. 258.

An Act to Amend an Act Entitled "An Act to Prescribe for the Inspection of Gasolines, Benzines, and Naphthas, Providing for the Fees, Tests, and for Other Purposes," Approved August 19, 1912, by Adding a New Section to Follow Section 4 and to be Numbered 4A and for Other Purposes.

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, That the Act approved August 19, 1912 entitled "An Act to prescribe for the inspection of gasolines, benzines, and naphthas, providing for the fees, tests and for other purposes" appearing in the published Acts of the General Assembly of 1912, on pages 149-152 inclusive, be amended by inserting after Section 4 a new section to be known as "Section 4*a* as follows, to-wit:

"Section 4*a*. The provisions of this Act shall apply not only to gasoline, benzines and naphthas sold or offered for sale in the State of Georgia, but likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia, for consumption or use. Where such commodities or any of them may be purchased within the State or without the State and brought into the State, by any person, firm or corporation, not for the purpose of selling or offering the same for sale, but for the purpose of use or consumption by the purchaser in manufacturing or other lawful uses, either as fuel or otherwise, the inspections herein prescribed shall be made, and the fees above fixed shall be paid therefor, except that no such purchaser shall be required to pay more than twelve hundred per year for the inspection of all such commodities used or consumed by his as aforesaid, and such payments may, in the discretion of the Commissioner of Agriculture, be divided into equal monthly payments of one hundred dollars each.

Section 2. Be it further enacted by the authority aforesaid, that this Act shall become effective upon the first day of the month succeeding its passage and approval.

26 Section 3. Be it further enacted, that all laws and parts of laws in conflict herewith be, and the same are, hereby repealed. Approved August 19, 1913.

10. Plaintiff shows that in 1918 the General Assembly of Georgia passed an act as will be found on pages 164-165 of the Georgia laws, said law purporting to amend an act approved August 12, 1903, section 5 thereof, but plaintiff supposes it was intended to amend the act of 1912 page 151 Georgia Laws, because there is no act of August 12th, 1903 nor any act of the year 1913 to which said amendment could apply. Said act passed in 1918 is as follows:

Inspection of Gasoline, Benzine, Naphtha. .

No. 453.

An Act to amend an Act, approved August 12, 1903, entitled An Act to provide for the inspection of gasolines, benzines, naphthas; providing for fees test by inserting after the word "tank" in line 10, Section 5, and before the word "nothing" the following: "If sold from a tank wagon, the person selling or delivering the same shall show on each sale ticket the gravity test of the gasoline, benzine or naphtha delivered to such retail dealer and for other purposes," so when thus amended said section shall read:

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by the authority of the same, that Section 5 of said Act shall read: "That every person dealing at retail in gasolines, benzines, and naphthas in this State shall from and after the passage of this Act deliver same to the purchaser only in barrels casks cans or packages designated by labels securely pasted or attached thereto with the words "Gasoline," "Benzine" or "Naphtha" "Dangerous," "Inflam-able" printed in bright red ink; provided, however, that this section does not apply to tank wagons or to car tanks or storage tanks, if sold from a tank wagon, the person selling or delivering the same shall show on each sale ticket the gravity test of the gasoline, benzine or naphtha delivered to such retail dealer. Nothing in this section shall prevent dealers from delivering gasoline by pumping or pouring same into automobiles."

27 Section 2. Be it further enacted that all laws in conflict with this Act are hereby repealed.

Approved August 19th, 1918.

11. Plaintiff shows that the following is a list of its total shipments of refined oil commonly known as kerosene oil and referred to as such in this bill and sold by plaintiff under the trade name of Crystalite, and gasoline into the State of Georgia in terms of gallons; all of said shipments being from points outside of the State of Georgia:

Year.	Kerosene.	Gasoline.
1914	1,451,962	1,622,755
1915	1,378,758	2,561,348
1916	1,952,368	6,303,153
1917	2,480,547	8,034,715
1918	3,063,500	10,326,316
1919	3,356,904	11,827,461
Total	13,684,039	40,675,748

JAMES L. NESBITT,
ROSSER, SLATON, PHILLIPS & HOPKINS, *Plaintiff's Counsel.*

GEORGIA,
Fulton County:

Personally appeared J. S. Jones, who on oath says he is Superintendent for the State of Georgia for the Texas Company and the highest officer of said company within the State, and that the allegations in the foregoing amendment are true.

J. S. JONES.

Sworn to and subscribed before me this April 2nd, 1920.
[SEAL.]
WM. B. HARTSFIELD,
Notary Public, Fulton County, Ga.

Amendment allowed this April 2, 1920.
SAM'L H. SIBLEY,
United States Judge.

Filed in Clerk's Office 2nd of April, 1920.
O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy.

28 *Amendment to Bill in Equity.*

To the Honorable Samuel Sibley, Judge United States District Court for the Northern District of Georgia:

Now comes the Texas Company and amends its bill and for amendment says:

The Inspectors will not inspect the said products of the Texas Company without being paid the full fee. The Plaintiff shows that this cause cannot be heard before three judges before and until the 23rd day of April, 1920, by reason of the engagements of the other judges, and the date of the hearing, therefore, is uncertain. Unless said oil be inspected, the plaintiff will be in the position of selling uninspected oil, and it desires to perform all responsible requirements while awaiting the judgment of the three judges provided for by statute.

Wherefore plaintiff is willing to pay the oil inspectors their fees for inspection of oil and gasoline until the hearing, leaving the bond to be responsible for the remainder that would otherwise go into the Treasury of the State, or it is willing to pay to the General Oil Inspector of the State, or such other person as the Court may designate, the full fee from which the local inspectors shall be paid their fees, and the remainder to be held by such depository of the court to abide the judgment of the hearing of the interlocutory injunction, and the plaintiff is willing to abide such order of the court as the court may deem equitable in the premises.

Wherefore, plaintiff prays that the Court modify its order in the respects indicated, and that plaintiff be granted protection under the order of the Court in conformity therewith.

JAMES L. NESBITT,
ROSSER, SLATON, PHILLIPS & HOPKINS,
Plaintiff's Counsel.

29 GEORGIA,
Fulton County:

Personally appeared before the undersigned, a Notary Public in and for said County, J. S. Jones, who on oath says that he is the highest officer of the plaintiff, and is Superintendent of the Texas Company for the State of Georgia, and that the allegations in the foregoing amendment are true.

J. S. JONES.

Sworn to and subscribed before me this April 3, 1920.
[SEAL.]
S. N. RUSHIN,
Notary Public, State at Large, Ga.

Read and considered: Let the amendment be allowed and let the defendants show cause before me Monday, April 5th, at the hour of 9 o'clock, why the order should not be modified as prayed.
Let a copy of this order be served on defendants' counsel.
This April 3rd, 1920.

SAM'L H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office April 3, 1920.
O. C. FULLER,
Clerk United States District Court,
Northern District of Georgia.

30 *Amendment to Bill in Equity.*

To Hon. Samuel H. Sibley, Judge U. S. Court for Northern District of Georgia:

Now comes the Texas Company, plaintiff in the above entitled cause and in response to the motion of defendant for greater particularity of statement and for further amendment says:

1. Plaintiff has heretofore set out the nature of its business in legal terms and has shown the interference by the defendants with interstate commerce by reason of the State laws set forth and their operation, which laws are all the laws upon the subject in the State of Georgia.

2. Plaintiff maintains that it is not compelled to set forth its evidence in pleading but to state only ultimate facts, but without conceding any right of defendants to demand further pleading, and denying their right thereto, plaintiff says:

3. Plaintiff owns and leases tank cars with an approximate capacity of 8,000 gallons each and it ships from points without the State its refined oil, crystilite or kerosene, which terms are interchangeable and means kerosene oil, and gasoline, to points within the State of Georgia. Said products are sold at wholesale and retail and shipments are made direct to customers in full tank car lots, all of said shipments being from points without the State. In some instances the orders for the shipments of full tank carlots are received from customers living without the state who desire shipments to them to points within the State of Georgia. When shipments are made of full tank car lots to customers within the State of Georgia, said tank cars are shipped directly to said customers at the designated points and are inspected by the local oil inspectors of the State of Georgia before being emptied from said tank cars. In some instances the customer pays the inspection fee and in other instances the plaintiff pays the inspection fee and the price at which said tank cars are sold to customers is determined to a large extent by the question as to who shall pay the inspection fees. In many instances the oil and gasoline are shipped in tank cars of the capacity
31 mentioned to the Texas Co. at the stations named in plaintiff's bill. Said oil and gasoline are there inspected in the original tank cars and samples taken therefrom before said tank cars are emptied. Then the oil and gasoline are placed in storage tanks of the plaintiff from which deliveries are made to customers consisting of grocery stores and sellers of gasoline in wholesale and retail quantities and others. Some customers come to the place where the storage tanks are located and in a large number of instances the plaintiff delivers by oil trucks owned by it.

4 Plaintiff therefore does business at wholesale and retail and does business in the State of Georgia by shipping directly to customers full tank car lots for which some orders are received in the State of Georgia and for which some orders are received from without the State of Georgia to be filled in the State of Georgia.

5. Further, at Bainbridge, Georgia, Augusta, Georgia, and Columbus, Georgia, plaintiff receives oil and gasoline in its tank cars as stated from which tank cars samples are taken and inspected before the emptying of the tank cars and thereafter the contents of the tank cars are put in storage tanks of the plaintiff. In Columbus, Georgia, the plaintiff sends its oil trucks over into Alabama, supplying its customers there and pay there the inspection fee of $\frac{1}{2}$ cent per gallon, which is only demanded on kerosene. At Augusta the same plan is pursued and oil trucks are sent over into South Carolina to supply customers there and the inspection fee of 1/8th cent per gallon is paid to the State of South Carolina. From Bainbridge, Georgia, the same plan is pursued and trucks are sent over to Quincy, Florida, to supply customers there, paying in Florida, 1/8th cent per gallon inspection fee. In each instance therefore, plaintiff pays the inspection fee of Georgia and the inspection fees of Florida, South Carolina and Alabama, as the case may be. Some oil and gasoline were delivered by rail into adjoining States.

32 6. The warehouses and various equipment set forth in plaintiff's bill are used for the sale, storage and distribution of plaintiff's oil and gasoline, after the same has been inspected from tank cars as set forth. Such equipment is not used or needed where the sale is in carload lots sent directly to customers. In all instances stated in this bill or any of its amendments, the shipment has been from points without the State to points within the State of Georgia.

7. Plaintiff has in the State of Georgia not exceeding three private tracks on which any of its aforementioned cars are delivered. The remaining tracks are owned by the railroads transporting said oil and gasoline.

8. The method of shipment of the oil and gasoline by plaintiff is as follows: As soon as a car is shipped, notification is sent to the local inspector of the car and the character of its contents, together with a check for the inspection fees and this is and has been the invariable custom for several years where the plaintiff paid the inspection fee instead of the customer as before explained. This plan notifies the inspector to be on the look-out for the car and he receives a check for the inspection fees prior to the arrival of the car. The form of notification to the inspector is a printed form accompanying the check. If the inspector does not, upon such notification, inspect the car, he is then notified of its arrival in order that such inspection may take place. Where the car is consigned to the Texas Co. within the State of Georgia, the bill of lading is made out to it, but under the law set out the plaintiff does not and is not permitted to sell or offer for sale or hold in storage the contents of such car prior to inspection and compliance with the laws set forth.

9. It is true that the law provides that the official inspector may refuse to inspect oil in bulk and require the owner or dealer in oils to put said oils in barrels or other packages for the retail trade. Said section of the law further provides that no official inspection of bulk oils shall be made at any place in the State except where said bulk oils are to be unloaded.

33 10. Plaintiff avers that such an order to place the contents of such tank cars in barrels as a preliminary inspection, accompanied by a charge of excessive inspection fees, would be a burden on interstate commerce equally with an inspection accompanied by excessive fees from the tank car itself and if such were not the case the said act destroys the principle of original package in interstate commerce by simply ordering the breaking of the original package and thereby accomplishing a violation of the Constitutional provision against interference with Interstate Commerce and plaintiff has prayed and does pray that such illegal action and unconstitutional law be enjoined.

11. As a matter of fact plaintiff avers that the inspectors do not require the emptying of said tank cars for inspection for the reason that such emptying is not necessary and because further under section

1804 of the law set out the inspector is not allowed any larger compensation for inspecting in barrels than in bulk and therefore the inspection in barrels would require more work without increase of compensation of the inspector. In addition, if the oil or gasoline were emptied into barrels a large proportion thereof would be for disposition by wholesale instead of by retail, which the language employed in the statute.

12. Plaintiff shows that none of its oil or gasoline reaches a state of rest or becomes a part of the mass of the property of Georgia because such condition also requires as an incident thereto the right of disposition and sale and storage which right does not exist and cannot exist under the laws of Georgia prior to inspection and liability for payment of illegal inspection fees and compliance with the requirements of the laws of Georgia as set out and said laws of Georgia cover by their terms all shipments into the State of Georgia, whether the same be interstate or intrastate and the same are indistinguishable and it is not apparent that the Legislature of Georgia would have provided a law imposing excessive inspection fees upon its citizens without requiring the payment of such inspection fees and compliance with the other provisions of the law by non-residents.

13. Wherefore, plaintiff avers that all of said inspection laws are void, the same being an entirety and being dependent upon
34 the exaction of excessive fees which burden interstate commerce, both through such fees and through the other requirements and operation of said laws and plaintiff prays that the same be declared void and their enforcement be enjoined.

JAMES L. NESBITT,
LUTHER Z. ROSSER,
JOHN M. SLATON,
B. Z. PHILLIPS,
STILES HOPKINS,
Plaintiff's Counsel.

GEORGIA,
Fulton County:

Personally appeared J. S. Jones, who on oath says he is Superintendent of the Texas Company for the State of Georgia and the highest officer therein, and that the facts set out in the above and foregoing amendment are true.

J. S. JONES.

Sworn to and subscribed before me this April 15, 1920.
[SEAL.]
WM. B. HARTSFIELD,
Notary Public, Fulton County, Georgia.

My Commission expires June 9, 1923.

Amendment allowed subject to objection. This April 17, 1920.
SAM'L H. SIBLEY,
Judge U. S. Ct.

Filed in Clerk's Office April 17, 1920.
O. C. FULLER,
Clerk,
By J. C. BOONE,
Deputy Clerk.

35 *Answer of Defendants.*

Come now the defendants named in the bill in the above entitled cause, and file this their answer to said bill.

1. The defendants admit the allegations contained in paragraph one of the bill.

2. The defendants admit the allegations contained in paragraph two of the bill.

3. In answer to the third paragraph of said bill, these defendants say that the allegations thereof are such that they are not required to make answer thereto, either by admitting or denying the same.

4. In answer to paragraph four of said bill, these defendants, for the lack of sufficient information, are unable either to admit or deny the allegations thereof.

5. In answer to paragraph five of said bill, these defendants say that the allegations thereof regarding the manner of conducting the business of the plaintiff in selling and offering for sale said products in the State of Georgia are vague, uncertain and insufficient, as set out more fully hereinafter, but said general allegations are admitted by these defendants. These defendants further say that when said oil, gasoline and other products of the plaintiff arrive at the local distributing stations in the State of Georgia, the same are held in the possession of the plaintiff with the control of absolute ownership, and for its own purposes and benefit, and with full power of disposition by selling the same, or offering them for sale, or storing the same, or otherwise disposing of the same, as it may see fit, and the same are not subjects of interstate commerce, but are a part of the mass of property in this State.

36 6. In answer to paragraph six of said bill, these defendants say that the allegations thereof, regarding the bringing of said products into the State of Georgia for the purpose of selling and offering the same for sale in this State, are vague, uncertain, indefinite and insufficient, as will appear more fully hereinafter. However, these defendants admit the general allegations made in said paragraph, but say further that upon the arrival of said products at the local distributing stations in this State, the same are held in the possession of the plaintiff with the control of absolute ownership, and for its own purposes and benefit, and with full power of disposition by selling or offering for sale the same, or storing the same, or otherwise disposing of the same, as may seem proper to the plaintiff, and said goods, after their arrival at said stations in Georgia, have reached their destination, and are not subjects of interstate commerce.

7. In answer to paragraph seven of said bill, these defendants say the following: They admit that said products of kerosene oil and gasoline are mainly brought into the State of Georgia by the plaintiff in tank cars, but they say said products are not required to be inspected under the laws set forth in said bill before being emptied from said tank cars. These defendants say that said oils and gasoline and other products brought into Georgia by the plaintiff, are never inspected by these defendants, or any of them, before said products have reached their destination in this State, and are delivered by plaintiff and held in this State by the plaintiff for sale. At the time said inspection is made, of said oils, gasoline and other products, the same are held in the possession of the plaintiff, in this State, with the control of absolute ownership, and for its own purposes and benefit, and with full power of disposition by selling or offering for sale the same, or storing the same, or otherwise disposing of the same, as it may seem proper, and at the time said products are
37 inspected they are not a subject of interstate commerce, and have no character in interstate commerce, but are at rest in this State, and are a part of the mass of property in this State, and held by the plaintiff for these purposes, or otherwise.

Further answering the allegations of said paragraph, these defendants admit that plaintiff has tanks, warehouses, buildings, machinery and other equipment for receiving, shipping, handling, selling and distributing said products, and they say further that said tanks, warehouses, buildings, machinery and other equipment are local facilities, established by the plaintiff for its own benefit in making whatever disposition of said products it may wish or desire, after the same have reached their destination in this State.

Further answering said paragraph seven of said bill, these defendants say that the allegation thereof, to-wit: "none of said products can be sold or offered for sale except upon compliance with the laws herein set out" is vague and uncertain, indefinite and insufficient, as more fully appears hereinafter. If it is meant by said allegation that said products in transportation, or before delivery to consignee in this State, or while held by the carrier for transportation, or as subjects of interstate commerce, cannot be sold or offered for sale except upon compliance with the laws set out in said bill, then said allegation is denied. If, on the other hand, it is meant by said allegation that said products, after they reach their destination in this State, and are delivered to the consignee in this State, and are withdrawn from the carriers and are held at rest in this State by the plaintiff, or consignees, for the purpose of sale, with full power of disposition, as a part of the mass of the property of this State, then said allegation is admitted.

38 8. In answer to paragraph eight of said bill, these defendants say that the allegations thereof, regarding the manner of bringing said products into the State of Georgia, and the disposition of the same in this State, are vague, insufficient and uncertain, as hereinafter set out. However, said general allegations are admitted, with the qualification that these defendants say that when said products arrive at the local distributing stations in this State,

they are held by the plaintiff with the control of absolute ownership, and for its own purposes and benefit, and with full power of disposition, that they are held at rest in this State by the plaintiff for the purpose of sale and are not subjects of interstate commerce.

9. In answer to paragraph nine of said bill, these defendants say that the allegations thereof are mere conclusions of the pleader, and are vague, uncertain, indefinite and insufficient, as more fully set out hereinafter. These defendants deny each and all of the allegations set out in said paragraph nine. They allege that when said products arrive at their destination in this State they are then held in the possession of plaintiff, with the control of absolute ownership, and for its own purposes, and are withdrawn from the carriers, and the plaintiff has full power of disposition thereof, by selling the same, or offering the same for sale, or storing the same, or otherwise disposing of the same, as it may see fit, and that said products are not subject to interstate commerce, but are at rest in this State, and constitute a part of the mass of property in this State.

10. In answer to paragraph ten of this bill, these defendants say that the allegations thereof with reference to the exact use made by the plaintiff of said plants and equipment, are vague, uncertain, insufficient and indefinite, as more fully appears hereinafter. Defendants admit that plaintiff has plants and equipment in
39 this State, and that it has and maintains various places of business in this State for the conduct of its business of offering for sale and selling in this State, kerosene oil and gasoline, and other products. Defendants are unable, for lack of information, either to admit or deny the other allegations of said paragraph, but they say that if the plaintiff has established said plants and equipment at its various places of business in the State of Georgia, the same constitute local facilities, established for its own benefit and convenience in selling its own products, which are withdrawn from the carriers and at rest in this State as a part of the mass of property in this State, and with absolute power of disposition by selling or otherwise. These defendants, for lask of information, are unable to say what plaintiff intends to do, or will do in the future, in the conduct of its said business.

11. In answer to paragraph eleven of said bill, these defendants, for lack of information, are unable to either admit or deny the same, but they do admit that in point of fact practically all commercial gasoline and kerosene oil, and other liquid motor fuels, or petroleum products, which are not subjects of interstate commerce, and are at rest in this State as a part of the mass of property therein, will be required to "come within the standards and meet the specifications so fixed."

12. In answer to paragraph twelve of said bill, these defendants say that they are unable to say, and that they do not know what the "real objection to the compliance with the provisions of said law," on the part of the plaintiff in this case, may be.

40 13. The allegations of paragraph thirteen of said bill are admitted.

14. The allegations contained in paragraph fourteen of said bill are admitted.

15. The allegations contained in paragraph fifteen of said bill are admitted.

16. The allegations contained in paragraph sixteen of said bill are admitted.

17. The allegations contained in paragraph seventeen of said bill are admitted.

18. These defendants are unable either to admit or deny the allegations of paragraph eighteen of said bill.

19. The allegations of paragraph nineteen of said bill are admitted.

20. The allegations contained in paragraph twenty of said bill are admitted.

21. The allegations contained in paragraph twenty-one of said bill are admitted.

22. The allegations contained in paragraph twenty-two of said bill are admitted.

23. The allegations contained in paragraph twenty-three of said bill are admitted.

24. The allegations contained in paragraph twenty-four of said bill are admitted.

25. The allegations contained in paragraph twenty-five of said bill are admitted.

26. The allegations contained in paragraph twenty-six of said bill are denied.

27. The allegations contained in paragraph twenty-seven of said bill are admitted.

28. Each and all of the allegations of paragraph twenty-eight of said bill are absolutely denied.

29. The allegations of paragraph twenty-nine of said bill are each and all denied.

30. The allegations of paragraph thirty of said bill are admitted.

41 31. The allegations of paragraph thirty-one are admitted.

32. In answer to paragraph thirty-two of said bill, these defendants admit that Section 1065 of the Penal Code of Georgia is as set out in said paragraph, but they deny the other allegations in said paragraph, except that they admit that if plaintiff, or any of its

agents should sell or offer for sale in this State any of said products which are not subjects of interstate commerce, but are held at rest in this State as a part of the mass of property of this State, it and they would be guilty of a violation of said section of the Code, but not otherwise, or under any circumstances or conditions.

33. The allegations of paragraph thirty-three of said bill are absolutely denied.

34. In answer to paragraph thirty-four of said bill, these defendants say that it is their purpose and intention, and it is their duty as sworn officers of this State, to seek to enforce said law in all proper and legal ways and means, but they deny the construction placed by plaintiff of said law, and aver that said law was not intended to, and in fact does not interfere with interstate commerce, or operate upon goods or articles in interstate commerce, and in the application and in the enforcement of said law, these defendants have not heretofore and do not now intend to apply said law to goods or articles in interstate commerce, or which have a character of interstate commerce. They further say that they have not heretofore, and do not now intend to enforce said law in such a way as to interfere with interstate commerce, but intend to enforce and apply it solely with reference to goods which have ceased to be articles of interstate commerce. Defendants especially deny the last allegation in said paragraph, to-wit: that these defendants will enforce or continue to enforce each and all of the provisions of said act in such
42 manner as will "prevent the plaintiff from selling in the State of Georgia its said products manufactured out of the State, as aforesaid."

35. The allegations of paragraph thirty-five of said bill are denied.

36. These defendants admit the allegations contained in paragraph thirty-six of said bill.

37. For lack of information, these defendants are unable either to admit or deny the allegations of paragraph thirty-seven of said bill.

38. These defendants say that law set forth in the bill in this case is not and was not intended to be a tax upon property, or a property tax.

39. These defendants say that all inspections of oil, gasoline and other products of the plaintiff are made by them after the same have reached their destination in this State, and have been withdrawn from the carriers and are no longer in transit by said carriers, and said inspections are made while said products are at rest in this State and are in the possession of the plaintiff, with the control of absolute ownership, and are held by it in this State for its own purposes and benefit, and with full power of disposition by selling or offering for sale the same, or by storing the same, as a part of the mass of the property of this State, and not otherwise.

40. Defendants show that the plaintiff has thirty-four local distributing stations established in the State of Georgia. At these stations the plaintiff maintains large stationary oil and gasoline tanks. Private railway tracks are built from the main line of the various railroads to these stations or tanks. Plaintiff also maintains the said stations, pumps, engines and machinery for the purpose of conveying said oil from said tank cars into said stationary tanks, and also maintains delivery tank wagons for the purpose of selling and delivering said oil and gasoline to retail dealers.

43 41. Plaintiff brings its oil and gasoline into Georgia in large tank cars consigned to itself and these cars are delivered by the railroads at the said distributing stations. At said distributing stations, the oil is conveyed by pumps and pipes from the said tank cars directly into the said stationary tanks. When said oil and gasolene are placed in said stationary tanks at said stations, the same is held in stock by the plaintiff for the purpose of selling the same and offering the same for sale to retail dealers in this State. Said oil and gasoline are sold and delivered from said stationary tanks, but not from said tank cars to its retail patrons or dealers in the territority convenient to said stationary tanks. All sales and deliveries of oil and gasoline to said retail dealers are made from said large stationary tanks.

42. Defendants fu-threr show than no oil or gasolene is ever inspected by them until the same has reached its final destination in this State and has been delivered by the carriers to the plaintiff or to the plaintiff's consignees. The universal practice and custom is for the plaintiff to make a written request to the local oil inspector to have said oils and gasolenes inspected at the places of final destination in this State which are the local distributing stations above referred to. Said oil and gasolene are inspected by said local inspector in the said tanks on the said private tracks at the said local distributing stations, and after said cars have been delivered by the carriers to the plaintiff.

43. Defendants show that said inspection of oils and gasolene is made while same are in said tank cars, as a matter of convenience to the plaintiff, because said oils and gasolene in said tank cars are to be placed in said stationary tanks and mingled with oil in said stationary tanks, which is already inspected, and the plaintiff, for this reason, desires the oil inspected before it is conveyed into said stationary tanks.

44. Defendants show that under said law, they have the right to refuse to inspect oil or gasolene in bulk and to require the
44 owner or dealer to put said oil or gasolene in barrels or other packages for retail trade before according the same an official inspection, but they show that they have not insisted upon this requirement for the reason that the plaintiff can more conveniently handle its oil by having the inspections made prior to the time the oil is conveyed from said tank cars into said stationary tanks.

45. Defendants show that it has never been the practice or custom or requirement in any case of these defendants, or of the Commissioner of Agriculture, or of the State Oil Inspector, that any of said oils or gasolenes be inspected or the fees paid before said oils or gasolenes have been delivered to and are in the possession of the plaintiff or its consignees in this State. These defendants do not demand and have never demanded that said oils and gasolines be inspected or the fees paid before the same is delivered in this State.

46. Defendants further show that the Commissioner of Agriculture and the General Oil Inspector and these defendants have never construed said law to require said inspections to be made or said fees to be paid prior to the actual delivery in this State of said oils or gasolenes, but, on the other hand, they have always construed said law to mean that said inspections should be made and fees paid only after the oil has reached its destination in this State and has been delivered to the consignee and is held in storage by the consignee for the purpose of sale or offering same for sale in this State.

47. Defendants further show that it is the universal rule and custom and practice that if the oil or gasolene is consigned to a purchaser in this State, or a person other than the vendor thereof, to inspect the same only after delivery to such consignee or purchaser and while in his possession, and not otherwise. In such cases, it is the universal rule, practice, and custom to inspect said oil and
45 gasolene after its delivery to the consignee.

48. Defendants further show that they have never undertaken to forbid the delivery of oil shipped from beyond this State to a purchaser of the same in this State by exacting the payment of said fees or demanding that said oil or gasolene be inspected prior to said delivery to said purchasers. The invariable practice, rule and custom is to allow the delivery of such oils or gasolenes to such purchaser, and to make the inspections and to collect the said fees after said delivery has been made.

49. Defendants further show that it is their invariable custom, rule and practice, in cases where oil or gasolene has been inspected and the fees paid, and such oil or gasolene is subsequently shipped out of the State of Georgia and sold or offered for sale in other States, to refund to the owner, dealer or shipper the total amount of the said fees paid by him on such oil or gasolene.

50. Defendants say that said law is valid. It does not apply to or interfere with interstate commerce, and defendants have no intention to so apply it or enforce it as to interfere with said commerce. Said law violates no provision of the Constitution of the State of Georgia, or of the United States.

51. If some of the expressions used in said law appear to refer to interstate commerce, these defendants do not so construe said law, and have not heretofore and do not now intend to apply the same to articles in interstate commerce. They further say that a law can-

not be declared unconstitutional unless it is clearly and unmistakably and directly in conflict with the Federal Constitution. They say that in no event can said law be construed as clearly and unmistakably in violation of any of the terms of said Constitution.

46 52. Defendants say that the State of Georgia has full power to levy a tax on trades, occupations, businesses and privileges exercised therein, for the purpose of raising revenue, and said law is a constitutional exercise of said power by the State of Georgia for said purpose.

53. These defendants further say that they have no intention to seek to inspect, or forbid the sale or offering for sale, in this State, of oils, gasolenes and other products of the plaintiff in interstate commerce, or in transit in this State in interstate commerce, or in the hands of carriers, or others, for transportation in interstate commerce, or which have, for any reason, the character of interstate commerce. If said law has ever been applied to articles in interstate commerce, it was unintentional *an* and by mistake, and with no purpose on the part of these defendants to so apply it.

54. These defendants say that paragraphs five, six, seven, eight, nine and ten of the bill in this case are vague, uncertain, indefinite and mere conclusions of the pleader, with reference to the alleged interstate character of the oils, gasolenes, etc., at the time of said alleged inspection, and a better statement thereof, and a further and better statement of particulars of the said allegations relating to interstate commerce, and the inspection thereof should be ordered by the Court.

55. The allegations in paragraph five of the bill, that plaintiff is selling and offering for sale in the State of Georgia, kerosene oil and gasolene, and other products, and the allegations in paragraph six thereof, that said oil and gasolene and other products, are brought by the plaintiff in to the State of Georgia from Texas and other states for the purpose of selling and offering same for sale in Georgia, and the allegations of paragraph seven thereof, to-wit: said
47 products of kerosene oil and gasolene are mainly brought into the State of Georgia by this plaintiff in tank cars, containing about eight thousand (8,000) galions each, and are inspected under the laws herein set out, before being emptied therefrom, constitute all the statements of specific facts in the entire bill to support the mere conclusion that said business of the plaintiff is interstate commerce, and that said products are inspected while they are in interstate commerce, and that the enforcement of said law is an interference with interstate commerce. Said allegations of fact are insufficient to support said conclusions. No specific facts are alleged showing whether plaintiff sells its products consigned directly to its purchasers in Georgia from beyond the State of Georgia, or whether said products are consigned to itself in the State of Georgia and delivered to itself in the State of Georgia, and stored in the State of Georgia, and kept or sold or offered for sale in this State, after being

so received from the carriers and stored, or taken possession of by the plaintiff in this State.

56. It is not alleged whether at the time of the making of said inspections, said products are being transported by the carriers, or are held by the carriers for transportation, nor is it alleged whether or not the bills of lading have been surrendered to the carriers at the time of said inspection, nor is it alleged in whose possession and control the said products are when said inspections are made.

57. Said paragraphs are insufficient in that the specific way and manner in which plaintiff conducts said business of selling and offering said products for sale are not set forth, and that the circumstances and conditions under which said inspections are made and the facts connected therewith, are not alleged.

48 58. Said paragraphs are insufficient in failing to state specific facts regarding the shipping of said products into the State of Georgia, and the sale or offering for sale therein, of such goods. No specific facts are set forth in said paragraphs, or elsewhere in said bill, from which it may be determined whether said inspections are made while said products are in interstate commerce, or whether said inspections are made after said goods arrive at their destination and are at rest in this State, and have become a part of the goods of this State, and after they have ceased to be interstate commerce.

59. It is not alleged whether said tank cars are consigned to the plaintiff, or to the purchaser of said goods in Georgia, nor whether said goods are sold before or after reaching their destination and coming to rest in the State of Georgia.

60. It is not alleged who owns said tank cars, nor whether at the time of said inspection the said tank cars are in the custody or control of the carriers or of the plaintiff, or whether they are on the side tracks of the carriers, or of the plaintiff, and it is not alleged whether at the time said inspections are made, said tank cars and said products have been delivered to the consignees, or to the plaintiff, nor whether at the time said inspections are made, said goods are held by the plaintiff in this State for the purpose of sale or offering for sale, or storage therein.

61. The allegations of paragraph seven of this bill, to-wit: that plaintiff maintains, in this State, tanks, warehouses, buildings, machinery and other equipment for receiving, shipping and handling, selling and distributing said products, are insufficient in that it is not alleged how said warehouses are used in the conduct of said business. No specific facts are alleged as to the manner in 49 which plaintiff's business is conducted in connection with said tanks, warehouses etc.

62. It is not alleged whether said products are sold or offered for sale in this State before or after the same has been placed in said tanks, warehouses, etc., nor is it alleged in just what way said tanks

are used in the conduct of said business and in the handling of said oil, gasolene, etc., nor is it alleged that said tanks are not local facilities established by it for its own benefit and convenience in handling and distributing intra-state oils and gasolenes.

63. The allegations in paragraph seven, to-wit: "none of said products can be sold or offered for sale except upon compliance with the laws herein set out," is a mere conclusion of the pleader, without any facts whatever being alleged to support said conclusion.

64. The allegations set out in paragraph eight of said bill are vague, uncertain, indefinite, and insufficient as to the way and manner in which said business is conducted, and the way and manner in which said products are sold and offered for sale to purchasers in the State of Georgia, both retail and wholesale.

65. The allegations set out in paragraph nine of said bill, to the effect that the business conducted by the plaintiff constitutes interstate commerce, is a mere conclusion of the pleader, without being sustained by any allegation of specific facts sufficient to authorize the same.

66. The allegations in paragraph ten, relating to plants and equipment established by the plaintiff in its various places of business in the State of Georgia, are insufficient and uncertain and indefinite, in that it is not alleged how and in what way said plants and equipment are used in the conduct of the said business, nor that they are not local facilities established by the plaintiff for its own benefit and convenience in distributing intra-state oil, gasolene, etc.

50 67. Defendants pray that the Court require the plaintiff to make said paragraphs, five, six, seven, eight, nine and ten more specific and definite, or that they be stricken from the bill.

Wherefore, defendants pray that said temporary restraining order be dissolved, and that both an interlocutory injunction and a permanent injunction be denied by the Court.

CLIFFORD WALKER,
Attorney General;
BREWSTER, HOWELL & HEYMAN,
MARK BOLDING,
Attorneys for Defendant.

GEORGIA,
Fulton Counrt-:

Personally appeared before the undersigned, Notary Public, duly authorized by law to administer oaths, M. P. Roane, who being duly sworn, upon oath says that he is General Oil Inspector of the State of Georgia, and that the allegations in the above and foregoing answer in the case therein stated are true.

M. P. ROANE.

Sworn to and subscribed before me this April 7th, 1920.

C. D. FOREACRE,
N. P. Ga., State at Large.

GEORGIA,
Fulton County:

Personally appeared before the undersigned, Notary Public, duly authorized by law to administer oaths, J. J. Brown, who being duly sworn, upon oath says that he is the Commissioner of Agriculture of the State of Georgia, and that the allegations in the above and foregoing answer in the case therein stated are true.

J. J. BROWN.

Sworn to and subscribed before me this April 7th, 1920.
C. D. FOREACRE,
N. P. Ga., State at Large.

Filed in Clerk's Office 7 April, 1920.
O. C. FULLER,
Clerk.
By J. D. STEWARD,
Deputy.

51 *Amendment to Answer of Defendants.*

Come now the defendants in the above entitled cause, and file this their answer by way of an amendment to the original answer to the amendment of the plaintiff, allowed and filed on April 2, 1920, and for answer thereto say:

1. The allegations of paragraph one thereof are substantially correct, and the same are admitted, subject to the right of these defendants to correct any errors therein which may appear by an inspection of the original published acts.

2. Defendants, for lack of knowledge, are unable either to admit or deny the allegations contained in paragraph two of said amendment.

3. The allegations of paragraph three of said amendment are admitted.

4. The allegations of paragraph four of said amendment are substantially correct, and the same are admitted, subject to the right of these defendants to correct any errors therein appearing from a comparison of said allegations with the original documents referred to.

5. For lack of knowledge, these defendants are unable either to admit or deny the allegations of paragraph five of said amendment.

6. The allegations of paragraph six of said amendment are admitted.

7. For lack of knowledge, these defendants are unable either to admit or deny the allegations of paragraph seven of said amendment, but say that the products shipped by plaintiff, as set out in said paragraph, are not subject to the laws complained of in said bill and amendment while they are in interstate commerce, neither were the fees paid thereon, nor the inspections made while said

52 goods were in interstate commerce.

8. These defendants deny each and all of the allegations set out in paragraph eight of said amendment, the taxation referred to, and provided for in said law is uniform upon the same class of subjects, but is not an ad valorem or property tax, and, therefore, the same is not in violation of article 7, section 2, and paragraph 1 of the Constitution of this State. Said act is not in violation of article 1, section 10, paragraph 2 of the Constitution of the United States, for the reason that said provisions of the Constitution refer to goods imported from or exported to foreign countries, and have no reference to commerce between the several states of the Union. It is no where alleged in the bill or in the amendment thereto that plaintiff's products are shipped from any foreign country into the State of Georgia.

9. The allegations of paragraph nine of said amendment are admitted, subject to the right to correct any errors appearing by an inspection of the original published acts.

10. The allegations of paragraph ten of said amendment are substantially correct, and are admitted, subject to the right to make any corrections of errors appearing from an inspection of the original published acts.

11. For lack of knowledge, these defendants are unable either to admit or deny the allegations contained in paragraph eleven of said amendment.

53 Wherefore, defendants pray that the injunction prayed for be denied, and that the tempo-are restraining order be dissolved.

CLIFFORD WALKER,
Att'y Gen'l:
BREWSTER, HOWELL & HEYMAN,
MARK BOLDING,
Attorneys for Defendants.

GEORGIA,
Fulton County:

Personally appeared before the undersigned officer, of the said State and County, duly authorized to administer oaths, M. P. Roane, who being duly sworn, on oath says that the allegations in the foregoing amendment and answer are true.

M. P. ROANE.

Sworn to and subscribed before me, this 10th day of April, 1920.

C. W. FOREACRE,
Notary Public, State at Large, Ga.

The above and foregoing amendment allowed and ordered filed, subject to objection, this April 10th, 1920.

SAML. H. SIBLEY,
United States Judge.

Filed in Clerk's Office 10th day of April, 1920.

O. C. FULLER,
Clerk.
By G. R. HOOD,
Deputy.

54 *Answer of Defendants to Second Amendment to Bill.*

Come now the defendants in the above entitled cause, and file this their answer to the amendment of plaintiff, allowed and filed on the 17th day of April, 1920, and by way of answer to said amendment say the following:

1. These defendants deny the allegations in paragraphs 1 and 2 of said amendment.

2. In answer to paragraph 3, the defendants admit the plaintiff owns tank cars of the capacity therein stated, and that it ships the articles referred to in said cars from points without the State of Georgia. Defendants further say that while it may be true in a very few instances that plaintiff sells and ships said products direct to customers in full tank car lots from points beyond the state, this business is so small as to be practically negligible, the amount of said products so shipped direct to customers not exceeding more than two (2) per cent of plaintiff's business. Further answering, defendants say that while said tank car lots so shipped direct to the customer may be inspected in some instances before being emptied from said tank cars, such inspections are made solely because defendants are requested by the plaintiff to so inspect said products, and not because these defendants, or any of them, require or demand that the inspection be made or the fees paid before the oil or gasoline is emptied from said tank cars. These defendants have never demanded or required that said oils or gasoline be inspected in the hands of the plaintiff or before being emptied from said cars, but these defendants aver that in the absence of a request by the plaintiff to so
55 inspect said oil and collect said fees, these defendants would not in any event inspect said oil or collect said fees from the plaintiff but would only make said inspections and collect said fees from the purchaser of said oil and after the same is in the hands of said purchasers in this State and is being sold or offered for sale by said purchasers. The other allegations in said paragraph are admitted.

3. These defendants deny the allegations in paragraph 4, as set out therein.

4. In answer to paragraph 5 of said petition, these defendants admit the allegations therein contained, except that they aver that whenever said oil and gasoline have been received in this State and inspected and the fees paid thereon, and are afterwards shipped beyond the limits of this State or sold beyond the limits of this State, in that event these defendants refund to the plaintiff the total amount of fees paid by it on all such oil or gasoline, and for this reason plaintiff is not required to pay any fees on any oil sold or shipped beyond the limits of the State of Georgia. In further answer to said paragraph, these defendants deny that they require or demand that any of said oil or gasoline be inspected or fees paid before the same is taken from said tank cars, and if inspections are made while same is in said tank cars it is only at the request of the plaintiff.

5. The defendants, for lack of knowledge, can neither admit or deny the allegations in paragraph 6.

6. In answer to paragraph 7, these defendants say that it may be true that the plaintiff owns not exceeding three private tracks
56 in the State of Georgia on which any of these cars are delivered, and that the other tracks may be owned by the railroads. These defendants have no information on that subject, except that they aver that at all of the distributing stations in this State there are tracks leading from the main line of the railroad to these stations, and that these tracks are not used generally by the public, but in practically all instances are used solely for the purpose of delivering said cars to the plaintiff at said stations, and that said tracks are, therefore, private tracks, and tracks which serve in practically all instances only the local stations located upon them.

7. In answer to paragraph 8 of said petition, these defendants deny the allegations therein as alleged, and say that the method of inspection is carried on as set out in their original answer. These defendants expressly and explicitly deny the following allegation of said paragraph: "Where the car is consigned to the Texas Company within the State of Georgia, a bill of lading is made out to it, but under the law set out the plaintiff does not and is not permitted to sell or offer for sale, or hold in storage the contents of a car prior to inspection and compliance with the law set out", if it is meant by said allegation that said law, either by its terms or in the manner in which it is enforced, requires inspections to be made or fees to be paid on oil or gasoline while the same is in transit or before it has ceased to be an article of interstate commerce or before the same is delivered to the plaintiff and is held by the plaintiff with
57 full power of disposition as a part of the mass of the property of the State of Georgia.

8. In answer to paragraph 9, these defendants say that the allegations thereof are not such that these defendants are required to

answer the same, but that the terms of said law will appear by an inspection or examination of the same.

9. In answer to paragraph 10 of said petition, these defendants deny the allegations thereof.

10. In answer to paragraph 11, these defendants deny the allegations of said paragraph and say that the truth of the matter is set forth in their original answer.

11. In answer to paragraph 12 of said amendment, these defendants deny each and all the allegations thereof, and say that the truth of the matter is set forth in their original answer.

12. In *In* answer to paragraph 14 of said amendment, these defendants deny each and all of the allegations thereof.

13. In further answer to said amendment, these defendants say that the interpretation placed upon Section 642 of the Penal Code of this State, as set out in the original petition, and the other sections of the Penal Code referred to therein, and to all the law of this State relating to the inspection of oils and gasoline and the collection of fees thereon, is that said laws relate only to oil and gasoline or other product of plaintiff that have ceased to be articles of interstate commerce and are at rest in this State as a part of the mass of the
58 property of this State. In other words, these defendants construe said law to refer solely and exclusively to intrastate goods and intrastate business and not to goods or business in interstate commerce or moving in interstate commerce.

14. Defendants further say that in the application and in the enforcement of said laws, and in making said inspections and collecting said fees, these defendants have not heretofore and do not now intend to apply said laws to goods or articles in interstate commerce, or which have a character of interstate commerce. They further say that they have not heretofore, and do not now intend to enforce said laws in such a way as to interfere with interstate commerce, but intend to enforce and apply them solely with reference to goods which have ceased to be articles of interstate commerce. If there are instances where such inspections have been made otherwise, and the fees paid otherwise, such things were done by inadvertance and without any intention on the part of these defendants to interfere with the sale and delivery of such products sold and delivered by plaintiff in interstate commerce.

CLIFFORD WALKER,
Att'y Gen'l;
BREWSTER, HOWELL & HEYMAN,
MARK BOLDING,
Attorneys for Defendants.

59 GEORGIA,
Fulton County:

Personally appeared before the undersigned officer duly authorized to administer oaths, J. J. Brown and M. P. Roane, who being duly sworn on oath say that they are the Commissioner of Agriculture and the General Oil Inspector, respectively, and that the facts set out in the above and foregoing answer to amendment are true.

M. P. ROANE.
J. J. BROWN.

Sworn to and subscribed before me this 23rd day of April, 1920.

C. W. FOREACRE,
Notary Public, Ga., State at Large.

Filed in Clerk's Office Apr. 23, 1920.

O. C. FULLER,
Clerk.
By J. D. STEWARD,
Deputy.

60 *Bond.*

Know all men by these presents: That we, The Texas Company, a body corporate, as principal, and the United States Fidelity & Guaranty Company, a body corporate, as surety, are held and firmly bound unto O. C. Fuller, as Clerk of said Court and unto his successors in office, in the penal sum of Five Thousand ($5,000.00) Dollars, for the payment of which well and truly to be made, we and each of us bind ourselves and our legal successors firmly by these presents.

Signed with our seals and executed by us on the 18 day of March, 1920.

The condition of the above obligation is such that, whereas on this day the Honorable Samuel H. Sibley, as Judge of said Court has granted a temporary restraining order in a certain cause pending on the equity side of said Court, wherein said above bounden The Texas Company is plaintiff and J. J. Brown as Commissioner of Agriculture of the State of Georgia and others are defendants, upon said plaintiff giving bond in said penal sum with security to be approved by the Clerk of this Court as shown by decretal order this day made by said Judge, reference to which is hereby made for the terms and provisions thereof and with conditions as hereinafter provided:

Now therefore, if we the said obligors shall well and truly pay such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully restrained by said order, or for whose use and benefit this obligation is made, then in that event this

obligation shall be void, otherwise it shall remain in full force and effect.

THE TEXAS COMPANY, [SEAL.]
Principal,
By Its Attorneys at Law, ROSSER, SLATON, PHILLIPS & HOPKINS.
UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
Security,
By FRAMER G. WITHERSPOON,
Attorney in Fact. [Corporate Seal.]

Approved this March 18th, 1920.
O. C. FULLER,
Clerk U. S. District Court,
Northern District of Georgia.

Filed in Clerk's Office March 18, 1920.
O. C. FULLER,
Clerk.

61 *Temporary Restraining Order.*

Upon reading and considering the petition in this case which is duly verified, and seeks to restrain and enjoin the enforcement and execution of certain laws of the State of Georgia relating to the inspection of Kerosene, Gasoline and similar products, upon the ground that said acts are in conflict with the Constitution of the United States, and seeking an interlocutory injunction pending a final hearing, which, under the statute of the United States can only be granted after determination by three judges and notice as prescribed by said statute; said bill is sanctioned and ordered filed. A hearing for interloctutory injunction is appointed to be had at Atlanta, Ga., on Thursday, March 25th, 1920, at 3 o'clock p. m.

It further appearing from the sworn allegations of said petition that pending the hearing above fixed immediate and irreparable loss and damage will result to complainant should relief be finally awarded as prayed for in said bill, in that the petitioner must either pay large sums to the State of Georgia from day to day under the said statutes, which could not be recovered from the State of Georgia in that no remedy is provided against said State under its constitution and laws, or else complainant will be subjected to penalties and punishments prescribed by the law sought to be enjoined, it is therefore ordered by this court that upon complainant executing a bond payable to the Clerk of this Court, with good and sufficient security to be approved by the said Clerk, in the penal sum of five thousand ($5,000.00) dollars conditioned for the payment of such costs, charges and damages as may be incurred or suffered by any party who may be proved to have been wrongfully restrained by such restraining order and for the payment of all inspection fees that may be adjudged payable by complainant until said appointed hearing,

that the defendants and each of them, their agents and representatives are restrained from exacting from the complainant any
62 fees for inspection of Kerosene, Gasoline or other fuels imported into the State of Georgia by complainant in interstate commerce or from enforcing any penalties against complainant for the nonpayment of such fees, until the further order of this Court.

Upon the giving and approval of the bond herein prescribed, the Clerk of this Court will forthwith issue notice to the several defendants in the bill of complaint of this order and of the giving and approval of said bond.

In Chambers, this 18th day of March, 1920.

SAM'L H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office 18th day of March, 1920.
O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy.

63 *Motion of Defendants to Make Bill More Specific, etc.*

Comes now the defendants in the above entitled cause, and present this motion to the court, for the grounds thereof, say:

1. Defendants say that the allegations of paragraphs five, six, seven, eight, nine and ten of the bill filed by the plaintiff in this case with reference to the alleged interstate character of the said oils, gasolines and other products of plaintiff at the time said alleged inspections are made are vague, uncertain, indefinate and insufficient and mere conclusions, without any specific statement of fact sufficient to authorize said conclusions, and that a better statement thereof and a further and better statement of the particulars and facts and circumstances in connection with the shipping, delivery, receipt, selling and offering for sale of said products and of the manner of conducting the plaintiff's business, should be ordered by the court.

2. The allegations of paragraph five of the bill that plaintiff is selling and offering for sale in the State of Georgia kerosene oil and gasoline and other products, and the allegation in paragraph six thereof that said oil and gasoline and other products are brought by the plaintiff into the State of Georgia from Texas and other States for the purpose of selling and offering same for sale in Georgia, and the allegations of paragraph seven thereof, to-wit: said products of kerosene oil and gasoline are mainly brought into the State of Georgia by this plaintiff in tank cars, containing about eight thousand gallons each, and are inspected under the laws herein set out before being emptied therefrom, constituting all the statements of specif- facts in the entire bill to support the mere conclusion that said business of the plaintiff is interstate commerce, and that said products are inspected while they are in interstate commerce and

that the enforcement of said law is an interference with interstate commerce. Said allegations of fact are insufficient to support
64 said conslusions. No specific facts are alleged showing whether plaintiff sells its products consigned directly to its purchasers in Georgia from beyond the State of Georgia, or whether said products are consigned to itself in the State of Georgia and delivered to itself in the State of Georgia and stored in the State of Georgia and kept or sold or offered for sale in this State, after being so received from the carriers and stored or taken possession of by the plaintiff in this State.

3. It is not alleged whether at the time of the making of said inspections, said products are being transported by the carriers or are held by the carriers for transportation, nor is it alleged whether or not the bills of lading have been surrendered to the carriers at the time of said inspection, nor is it alleged in whose possession and control the said products are, when said inspections are made.

4. Said paragraphs are insufficient in that the specific way and manner in which plaintiff conducts said business in selling and offering said products for sale, and in not alleging circumstances and conditions under which said inspections are made and the facts connected therewith.

5. Said paragraphs are insufficient in failing to state specific facts regarding the shipping of said products into the State of Georgia and the sale or offering therein of such goods. No specific facts are set forth in said paragraphs or elsewhere in said bill from which it may be determined whether said inspections are made while said products are in interstate commerce, or whether said inspections are made after said goods arrive at their destination, and are at rest in this State and have become a part of the goods of this State and after they have ceased to be interstate commerce.

65 6. It is not alleged whether said tank cars are consigned to the plaintiff or to purchasers of said goods in Georgia, nor whether said goods are sold before or after reaching their destination and coming to rest in the State of Georgia.

7. It is not alleged who owned said tank cars nor whether at the time of said inspection the said tank cars were in the custody or control of the carriers or of the plaintiff, or whether they are on the side tracks of the carriers or of the plaintiff, and it is not alleged whether at the time said inspections are made said tank cars and said products have been delivered to the consignees or to the plaintiff, nor whether at the time said inspections are made said goods are held by the plaintiff in this State for the purpose of sale or offering for sale or storage therein.

8. The allegations of paragraph seven of said bill, to-wit. That plaintiff maintains in this State tanks, warehouses, buildings, machinery and other equipment for receiving, shipping, handling, selling and distributing said products, are insufficient in that it is not alleged how said warehouses are used in the conduct of said

business. No specific facts are alleged as to the manner in which plaintiff's business is conducted in connection with said tanks, warehouses, etc.

9. It is not alleged whether said products are sold or offered for sale in this State before or after the same have been placed in said tanks, warehouses, etc., nor is it alleged in just what way said tanks are used in the conduct of said business and in the handling of said oil, gasoline, etc., nor is it alleged that said tanks are not local facilities established by it for its own benefit.

10. The allegations of paragraph seven, to-wit: "None of said products can be sold or offered for sale except upon com-
66 pliance with the laws herein set out," is a pure conclusion of the pleader without any facts whatever being alleged to support said conclusion.

11. The allegations set out in paragraph eight of said bill are vague, uncertain, indefinite and insufficient as to the way and manner in which said business is conducted, and the way and manner in which said products are sold and offered for sale to purchasers in the State of Georgia, both retail and wholesale.

12. The allegations set out in paragraph nine of said petition to the effect that the business conducted by the plaintiff constitutes interstate commerce is a mere conclusion of the pleader without being sustained by any allegation of specific facts sufficient to authorize the same.

13. The allegations in paragraph ten relating to plants and equipment established by the plaintiff in its various places of business in the State of Georgia are insufficient and uncertain and indefinite in that it is not alleged how and in what way said plants and equipment are used in the conduct of the said business, nor that they are not local facilities established by the plaintiff for its own benefit in distributing intrastate oil, gasoline, etc.

Wherefore, these defendants pray the court will order the plaintiff to make a further and better statement of the said allegations relating to interstate commerce and a further and better statement of particulars upon which the conclusion alleged in said petition relating to interstate commerce is based, or that in lieu thereof that this motion be sustained and said paragraphs be stricken from
67 the said bill.

CLIFFORD WALKER,
Atty. Genl.;
BREWSTER, HOWELL & HEYMAN,
MARK BOLDING,
Attorneys for Defendants.

Filed in Clerk's Office 7th day of April, 1920.
O. C. FULLER,
Clerk,
By J. D. STEWARD,
Deputy.

68 *Order Referring Cause to Special Tribunal of Three Judges.*

Application having been made heretofore for the hearing before three judges under provision of Section 266 of the Judicial Code, upon the application of the plaintiff herein for an interlocutory injunction restraining the enforcement of certain statutes of the State of Georgia on the ground that the same are in contravention of the Constitution of the United States and of the State of Georgia.

And it appearing proper in the premises, it is therefore ordered, that this cause be and the same hereby is referred to Honorable R. W. Walker, Circuit Judge of the Fifth Judicial Circuit of the United States, to the Honorable Beverly D. Evans United States District Judge for the Southern District of Georgia and to myself as United States District Judge for the Northern District of Georgia, for the purpose of hearing and determining said application of the plaintiffs for an interlocutory injunction herein.

This order is signed nunc pro tunc as of date the 18th day of March, 1920.

SAML. H. SIBLEY,
United States District Judge.

Filed in Clerk's Office 6th day of July, A. D. 1920.
O. C. FULLER,
Clerk.
By JON DEAN STEWARD,
Deputy Clerk.

69 *Order Modifying Restraining Order, etc.*

The attention of the Court being drawn to the fact that the restraining heretofore granted is unnecessarily drastic and is resulting in impeding the operation of oil deliveries, upon hearing from both parties and upon further consideration of the matter, it is ordered that the same be modified so that the oil inspectors of the State, their agents and representatives are not restrained from executing the inspection laws of Georgia any further than this, to-wit: that they shall not pay any moneys coming into their hands from inspection fees to the State Treasurer or into the Treasury of the State of Georgia, but will hold same subject to the further order of this court. They are not restrained from taking from the fees collected any amount allowed by law for inspection.

This 6th day of April, 1920.

SAM'L H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office 6th day of April, 1920.
O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy.

70 In the District Court of the United States for the Northern District of Georgia.

THE TEXAS COMPANY

vs.

J. J. BROWN, Commissioner of Agriculture of Georgia.

The Plaintiff introduced the following evidence in the cause:

Copy of Charter of The Texas Company, showing the same to have been incorporated under the laws of the State of Texas.

Receipt from the Comptroller General showing the payment of the Occupation Tax upon corporations required by the State for the year 1920, after having registered its Name, Capital Stock, and names of Agents in office.

Affidavit of C. P. Dodge, of Houston, Texas, who states that he is Manager of the Sales Department, Southern Territory, of The Texas Company, which territory includes the State of Georgia; that said Company was incorporated under the laws of the State of Texas, the amended charter of said corporation having been filed in the office of Secretary of State of Texas June 26, 1917; that said Company is doing business under its said charter and that all the business transacted by said Company in the State of Georgia is done under its said charter.

Affidavit of J. Harrod, who says that he is Chief Accountant of said Company, located in Houston Texas, that the territory under his charge includes the State of Georgia, and that in the discharge of his duties he knows the amount of inspection fees paid to the Inspectors of the State of Georgia on refined oil or kerosene and gasoline during the calendar years 1914 to 1919, inclusive, to be as follows:

Year.	Kerosene.	Gasoline.
1914	6,018.27	7,772.55
1915	7,975.73	13,705.79
1916	8,298.89	26,652.29
1917	11,260.53	36,019.92
1918	15,401.82	51,739.37
1919	16,458.02	63,071.53
Total	$65,413.26	$198,961.45

71 Affidavit of R. M. Ferguson, Chief Accountant*e* of The Texas Company at Atlanta, Georgia, that as such he is acquainted with the management of the business of said Company,

and its accounts, and oil inspections in the State of Georgia; that shipments of The Texas Company into the State of Georgia directly to customers between the years 1914 and 1919 of gasoline and kerosene oil were as follows:

Year.	Kerosene.	Gasoline.
1914	92,235	16,027
1915	32,251	108,859
1916	38,138	268,741
1917	28,057	264,839
1918	32,282	8,210
1919	44,481	373,044
Total	267,444	1,039,720

Shipments of kerosene oil and gasoline by said Company into the State of Georgia including shipments direct to customers in tank cars and sales at local stations from storage tanks, were as follows:

Year.	Kerosene.	Gasoline.
1914	1,451,962	1,622,755
1915	1,378,758	2,561,348
1916	1,952,368	6,303,153
1917	2,480,547	8,034,715
1918	3,063,500	10,326,316
1919	3,356,904	11,827,461
Total	13,684,039	40,675,748

The sales of kerosene oil and gasoline in the State of Georgia by the Texas Company are larger during the year 1920 than during same months of 1919, these being the only grades of petroleum products inspected by the oil inspectors of said State.

Affidavit of R. M. Ferguson, who states that he is Chief Accountant of The Texas Company at Atlanta, Ga., that he is acquainted with the accounts of said Company, its management and methods of doing business and oil inspections in the State of Georgia. That inspection fees paid by said Company for kerosene oil and gasoline shipped into said state during the years 1914 to 1919 were as follows:

Year.	Kerosene.	Gasoline.
1914	6,018.27	7,772.55
1915	7,975.73	13,705.79
1916	8,298.89	26,652.29
1917	11,260.53	36,019.92
1918	15,401.82	51,739.37
1919	16,458.02	63,071.53
Total	$65,413.26	$198,961.45

72 That shipments of kerosene oil and gasoline directly to customers in the State of Georgia, made in original tank cars are correctly shown by exhibit "A" attached and made a part of said affidavit, said exhibit showing place from which shipped, name of customer and address, character of produce shipped, number of cars and date. Also who paid the inspection fees, and affiant is informed that no inspection fees were required of the Government on shipments made directly to a military post. In all cases where inspection fees were paid by said Company, a printed form, shown as exhibit "B" hereto was sent direct to local inspector, with check for inspection fees attached, as soon as car was shipped from initial point, copies of said form being made to the Company's offices in Atlanta, and Houston, Texas, That none of the gasoline or kerosen oil of The Texas Company originates in the State of Georgia.

Under the method of doing business by The Texas Co., the gasoline and kerosene oil, the latter product being also known as crystalite or refined oil, are shipped into the state in tank cars owned by The Texas Co., and containing approximately 8,000 gallons each. As above stated, as soon as a car is shipped, a printed slip of which exhibit "B" is a copy, together with check for inspection fees is forwarded to the local inspector, reaching him in nearly all cases before the car arrives. One copy of this slip is made for the office of The Texas Co., in Atlanta and the other for the head office in Houston, Texas, while the other copy is sent to the local oil inspector with check as stated.

Upon the arrival of the car at the agency of The Texas Company, of which there are 34 in Georgia, the local oil inspector inspects the oil or gasoline by a sample taken from the original tank car, after which the oil or gasoline is emptied into storage tanks of The Texas Company, from which it is sold to customers. So far as affiant has ever heard the emptying of the tank car for purpose of storage, sale or offering for sale, before inspection, would be in violation
73 of the law and is not permitted. After storage in tanks, the oil and gasoline are distributed to wholesale, and rail dealers and supply stations by delivery trucks. The Texas Company itself has 5 supply stations in Atlanta and one in Griffin, and no other supply stations in the State of Georgia. It also sells to its customers direct from said storage tanks.

Said Company also sells whole tank cars of gasoline and kerosene direct to customers within the state, shipping same directly to address of such customers, the price of which is regulated by whether it or the customer pays the inspection. When customer pays the inspection fee printed form Exhibit "B" is not sent local inspector, nor when sale is made to the Government for a military post. The attached exhibits show separately such sales on which said Company paid the inspection fees and those on which customer paid same.

At the agency-s of the Texas Co., located at Bainbridge, Augusta, and Columbus, Ga., the Company sends its supply trucks into Florida, South Carolina and Alabama, respectively, to supply its customers, paying in each State 1/8th of one cent per gallon for inspec-

tion in addition to the inspection fee of Georgia, except in Alabama where the inspection fee is ½ cent per gallon on kerosene only.

At Augusta, Georgia, there is a suburb known as North Augusta, which is in South Carolina. Tank cars of gasoline and kerosene intended for this suburb are ordered shipped to Augusta because of the railroad rate, and are stopped at North Augusta. If by inadvertence a car is shipped into Augusta, Ga., and inspection fee collected, it is refunded because the oil is not stored, sold or offered for sale in Georgia, but sent back to North Augusta on the South Carolina side. This is the only instance which affiant is aware of or has been informed of any refund on the part of any inspector.

Affiant has never heard of any oil or gasoline of The Texas Company being rejected on inspection, nor of any case where the inspector required the emptying of the tank car in barrels for
74 the purpose of inspection. If such requirement were made it would be at considerable cost and a great burden to The Texas Company because the barrels would then have to be reemptied into the storage tanks since they are not adapted to the disposition of the oil and gasoline and the cost of both labor and purchase of barrels would be considerable, in addition to the loss from leakage and there would also be no need of having such tank cars emptied for the purpose of inspection because the inspection could be made equally as well from the tank car as from barrels.

75

Exhibit "A."

Shipments to Customers on Which Inspection Charges — Paid by the Texas Co.

July, 1916, to December, 1917.

From—	Order No.	Name.	Address.	Gasoline.	Kerosene.	Tex. No.	Date.
W. Tulsa	A—1531	Tift's Garage	Tifton, Ga.	8051		2917	10/21/16
Jackson-	2044	"	" " "	9197		6098	12/21/16
ville, Fla.	2045	"	" " "	8027		2717	1/15/17
" "	2046	"	" " "	8131		2923	2/10/17
" "	2151	Gray Vinson	Waynesboro, Ga.	8075		2849	12/26/16
" "	2152	"	" " "		8058	1689	12/26/16
" "	1208	Ford Motor Co.	Atlanta, Ga.	8098		2653	1/25/17
W. Tulsa	1276	W. Hopkins	Newnan, Ga.	8083		2897	1/31/17
Jackson-	1443	Canfield Oil Co.	Macon, Ga.		8066	2767	2/22/17
ville, Fla.	1746	Tift's Garage	Tifton, Ga.	8051		2982	3/22/17
" "	1495	Gray Vinson	Waynesboro, Ga.	8051		2984	10/30/16
" "	1496	"	" " "	7983		1850	10/19/16
W. Tulsa	1866	Tift's Garage	Tifton, Ga.	8107		2933	11/25/16

Deliveries to U. S. Government, L. C. L.

1917.

From—	To—	Gasoline.	Kerosene.
Atlanta	U. S. Marine Corps, Atlanta	123	
Atlanta	Dept. Q. M. Forsyth Bldg. "		154
Augusta	U. S. Arsenal, Augusta "	1230	5
Augusta	Camp Hancock, Augusta	7102	162
Brunswick	U. S. Coast Survey, Brunswick	383	
Macon	Quartermaster, Macon	172	100
Rome	Quartermaster, Ft. Oglethorpe		1338
Total		9010	1759

Inspection fee paid by Texas Company.

EXHIBIT "A."—*Continued.*

76

Inter-State Shipments as Shown Below.

From—	To—	Year.	Gasoline.	Kerosene.	Total.
Augusta	Aiken, S. C.	1917		1620	
	Warrenville, S. C.	1917	324		
	Rollins, S. C.	1917	432	108	
	Aiken, S. C.	1918	486		
	Allendale, S. C.	1918	550		
	Baldock, S. C.	1918	55		
	Rollins, S. C.	1918	110		
	Hattiesville, S. C.	1919	990	220	
	Myers Mill, S. C.	1919	2301	330	
	Rollins, S. C.	1919	660	495	
	Baldock, S. C.	1919	160		
	McCormick, S. C.	1919	440		
	Anderson, S. C.	1919	22		
	Greenville, S. C.	1919	55		
	Waterloo, S. C.	1919	55		
	Coronoca, S. C.	1919	55		
	Laurens, S. C.	1919	165		
	Barkesdale, S. C.	1919	55		
	Fairfax, S. C.	1919	330		
	North Augusta, S. C.	1919	486		
	Millette, S. C.			165	
			5774	1210	
Bainbridge	Quincy, Fla.	1917	150		
	Chattahoochee, Fla.	1919	440		
	Quincy, Fla.	1919	1468	40	

	Quincy, Fla.	1919	1468	40
	Upper Chattahoochee Landing, Fla.	1919	110	
			2168	40
Columbus	Phoenix City, Ala.	1919	16202	85217
	Girard, Ala.	1919	6070	38260
	Smith, Ala.	1919		605
	Seale, Ala.	1919	216	702
	Cottenton, Ala.	1919	108	54
			22596	124838
Rome	Lawrence, Ala.	1917	57	
	Gaylesville, Ala.	1917	57	
	Farrell, Ala.	1918		30
	Cedar Bluff, Ala.	1918	57	57
	LaFayette, Tenn.	1918	57	
			228	87
Savannah	Green Pond, S. C.	1917	542	353
	Gilmania, S. C.	1917	56	150
	Allendale, S. C.	1917		270
	Estill, S. C.	1917		561
	Gilman, S. C.	1917		199
	Estell, S. C.	1918		557
	Lebeco, S. C.	1918	54	54
	Wiggins, S. C.	1918		860
	Gilmania, S. C.	1918	54	403
	Gilman, S. C.	1918		50
	Green Pond, S. C.	1918		54

EXHIBIT "A."—*Continued.*

From—	To—	Year.	Gasoline.	Kerosene.	Total.
Savannah	Wiggins, S. C.	1919	270	509	
	Gilmania, S. C.	1919		579	
	Ridgeland, S. C.	1919		54	
			976	4833	
West Point	Langdale, Ala.	1917	2010		
	Shawmut, Ala.	1917	750		
	Langdale, Ala.	1918	1310		
	Shawmut, Ala.	1918	1310		
			5380		
Total gasoline			37122		
Total kerosene				131008	

Deliveries to U. S. Government.

1918.

From—	To—	Gasoline.	Kerosene.
Americus	Souther Field, Americus, Ga.	9,770	600
Atlanta	Ft. McPherson, Atlanta	5,850	...
Savannah	Const Quartermaster, Savannah	270	...
Savannah	Coast Guard Savannah	...	51
Atlanta	Camp Exc. Camp Gordon	339	90
Atlanta	U. S. Depot Q. M. Garage, "	...	54
Atlanta	Div. Exc. "	162	...
Atlanta	Co. C 326 Inft.	...	20

Atlanta	Camp Exc. Officer "	54	...
Atlanta	Depot Q. M. Forsyth Bldg.	275	1,623
Atlanta	Depot Q. M. Candler Whse.	...	50
Atlanta	Depot G. M. Garage, Whitehall & McD.	...	54
Atlanta	Whse. Zone Supply Officer	...	5
Americus	Supply Officer Aviation Tr. Camp.	4,630	300
Atlanta	U. S. Marine Corps, Atlanta	295	...
Americus	Q. M. Souther Field, Americus	8,015	1,200
Cordele	G. M. Souther Field, Americus	130	...
Albany	Air Service Flying School	25	...
Columbus	Motor Trf. Camp, Camp Benning	13,309	190
Augusta	Camp Q. M. Camp Hancock	27,135	548
Savannah	U. S. Engineers, Savannah, Ga.	3,860	1,523
Brunswick	U. S. Engineers, Brunswick, Ga.	204	...
Fitzgerald	Q. M. Eng. Dept. Fitzgerald	15	...
Brunswick	U. S. P. Wanderlust, Brunswick	...	30
Brunswick	U. S. Naval Station, Brunswick	40	513
Macon	Co. G 124 Inft., Camp Wheeler	179	...
Macon	U. S. Engineers, Camp Wheeler	70	10
Atlanta	Camp Q. M. Camp Gordon	1,431	...
Brunswick	U. S. Quarantine Station	372	...
Total		76,430	6,861

Inspection fees paid by The Texas Company.

EXHIBIT "A."—*Continued.*

Shipments to Customers on Which Customer Paid the Inspection Charges.

July, 1916, to December, 1917.

From—	Order No.	Customer, Address.	Gasoline.	Tex No.	Date.
Jacksonville	2073	Yar-Yan Ros & Turp Co., Brunswick	8091	2849	12/14/16
	2074	" " " " " "	8124	3040	12/18/16
	2075	" " " " " "	8100	2989	12/16/16
Chas't'n	1238	Peoples Oil Co., Augusta, Ga.	8010	2771	1/25/17
Jacksonville, Fla.	1239	" " " " "	8151	2980	2/ 5/17
	140	" " " " "	8132	3017	2/10/17
	1241	" " " " "	8033	2918	2/24/17
	1242	" " " " "	8052	3040	2/28/17
"	1547	Yar-Yan Ros & Turp Co., Brunswick	8042	2887	3/24/17
"	1542	" " " " " "	7925	1804	3/30/17
"	1549	" " " " " "	8058	2753	3/31/17
"	1550	" " " " " "	8042	2849	3/31/17
"	1551	" " " " " "	8042	2923	4/ 2/17
"	1552	" " " " " "	8037	2980	4/ 3/17
"	1553	" " " " " "	8187	2627	4/ 3/17
"	1554	" " " " " "	7977	117	4/ 3/17
"	1555	" " " " " "	8050	2887	4/ 4/17
"	1556	" " " " " "	10059	471	4/ 4/17
"	2635	Peoples Oil Co., Sparta, Ga.	8051	4350	6/27/17
"	1804	" " " " "	6041	1050	3/30/17
"	1145	Yar-Yan Ros & Turp Co., Brunswick, Ga.	8181	6098	1/22/17
"	1146	" " " " " " "	8065	2714	1/30/17

"	 1147	"	"	"	"	"	"	"	...	8003	2717	1/31/17
"	 2163	"	"	"	"	"	"	"	...	8084	3040	1/ 2/17
"	 2164	"	"	"	"	"	"	"	...	8019	2717	1/ 5/17
"	 2165	"	"	"	"	"	"	"	...	8074	2753	1/ 8/17
"	 2166	"	"	"	"	"	"	"	...	8092	2918	1/15/17
"	 2167	"	"	"	"	"	"	"	...	10000	109	1/17/17
"	 1150	"	"	"	"	"	"	"	...	9980	116	3/10/17
"	 1151	"	"	"	"	"	"	"	...	8019	2988	3/16/17
"	 1153	"	"	"	"	"	"	"	...	8209	2092	3/23/17
"	 1154	"	"	"	"	"	"	"	...	8044	4129	3/24/17
"	 1148	"	"	"	"	"	"	"	...	8173	102	2/12/17

Shipments Direct to Customers in the State of Georgia.—From Jan. 1st, 1918, to Dec. 31st, 1918.

1918.

Order No.	From—	Name.	Address.	Crys.	Gaso. Date.	Tex. Insp.
A-7876	JAX	City of Vienna,	Vienna, Ga.	8042	2/11/18—1689	TNB—16570

Inspection fees paid by Texas Company.

EXHIBIT "A."—*Continued.*

79 Shipments Direct to Customers in the State of Georgia, Jan. 1st, 1918, to Dec. 31st, 1918.

1918.

Order No.	From—	Name.	Address.	Crys.	Gaso.	Date.	Tex.	Insp.
A-696	Jax.....	R. C. Neely Co.....	Waynesboro	7995	....	7/12/18	2977	
A-1916	" ...	" "	" ...	8051	....	9/ /18	2982	
A-4280	" ...	" "	" ...	8194	....	10/ 1/19	4492	
A-1572	Chas.....	Q. M. Souther Field....	Arles, Ga.....	....	8210			
				24240	8210			

Inspection fees paid by customers.

Shipments Direct to Customers in the State of Georgia from January, 1919, to Dec. 31, 1919.

1919.

Order No.	From—	Name.	Address.	Crys.	Gaso.	Date.	Tex.	Insp.
A-347	Chas.....	Camp Q. M. C. Forrest..	Camp Forrest....	....	8297	1/16/19	2066	None.
A-548	"	" "	Jesup, Ga.....	....	8130	"	2769	
A-384	"	" " C.....	Camp Forrest...	....	8259	1/22/19	2048	
A-385	"	" "	" "	....	8107	1/27/19	2954	
A-386	"	" "	" " ...	....	8259	2/ 1/19	2019	
A-387	"	" "	" " ...	....	8124	2/ 4/19	2972	
A-388	"	" "	" " ...	....	8134	2/12/19	2951	
A-647	"	" "	" " ...	....	8123	2/14/19	2867	
A-657	"	" "	" " ...	....	8293	2/15/19	2032	
A-674	"	" "	" Jesup, Ga.	....	8273	2/10/19	2066	
A-659	"	" "	" Forrest, Ga.	....	8241	3/28/19	2146	
A-658	"	" "	" " ...	....	8179	3/22/19	1890	
A-1504	"	" "	" Jesup, ...	....	8265	3/13/19	4438	

A–3080	Mobile...	" "	" " ...	....	7999	6/25/19	2815			
A–3890	" ...	Sup. Officer.....	Ft.Oglethorpe, Ga.	....	8146	7/26/19	4155			
A–3658	" ...	" "	Camp Jesup "	....	8003	7/19/19	3023			
A–3657	" ...	" "	" Gordon "	....	8124	7/17/19	4275			
A–3652	" ...	" "	Ft. Oglethorpe "	....	7937	7/17/19	4270			
A–3539	" ...	" "	" " "	....	8137	7/12/19	4155			
A–3699	Jax.....	G. C. Smith.....	Brunswick "	....	8079	7/26/19	6096			
A–4200	" ...	" "	" "	....	8090	7/31/19	6099			
A–4542	" ...	" "	" "	....	9631	8/21/19	901	(RYTX)		
A–4578	Mbl.....	Camp Sup. Ofer.....	Ft. Oglethorpe "	....	7951	7/22/19	*1794			
A–4528	" ...	" " "	" " "	....	8127	8/16/19	4284			
A–4446	" ...	" " "	" " "	....	8176	8/12/19	2044			
A–4445	" ...	" " "	Camp Jesup, Ga.	....	8173	8/12/19	4749			
A–4426	" ...	" " "	" " "	....	7997	8/ 8/19	3035			
A–4338	" ...	" " "	" " "	....	8047	8/ 5/19	4334			
A–4339	" ...	" " "	Ft. Oglethorpe "	....	8174	8/ 6/19	2055			
A–4440	" ...	" " "	Camp Gordon "	....	8007	8/12/19	2815			
A–4892	Jax.....	G. C. Smith.....	Brunswick, Ga.	....	8149	9/11/19	4418			
A–4786	" ...	" "	" "	....	9875	9/ 5/19	111			
A–4858	Chasn....	F. C. Neely Co.....	Waynesboro "	8183	....	9/19/19	4470			
A–4694	Mbl.....	Camp Sup. Ofer.....	Camp Gordon "	....	8132	9/24/19	4275			
A–5563	Jax.....	Natl. Oil Co.....	Savannah, Ga.	....	8022	10/25/19	8028			
A–5564	" ...	" "	" "	8315	....	10/25/19	6052			
A–5064	" ...	" "	" "	....	8171	10/31/19	2211			
A–5051	" ...	" "	" "	....	6031	10/ 2/19	6051			
A–5065	" ...	" "	" "	8251	....	10/ 4/19	8844			
A–5095	" ...	" "	" "	8010	....	10/10/19	8028			
A–5094	" ...	" "	" "	....	6010	10/10/19	6052			
A–5840	" ...	G. C. Smith.....	Brunswick, Ga.	....	8127	10/20/19	4286			

EXHIBIT "A."—*Continued.*

Order No.	From—	Name.	Address.		Crys.	Gaso.	Date.	Tex.	Insp.
A–5516	" ...	Natl. Oil Co.....	Savannah	"	8014	....	10/17/19	8028	
A–5514	" ...	" "	"	"	....	6016	10/17/19	6052	
A–6221	" ...	" "	"	"	....	6059	11/28/19	6052	
A–5596	" ...	" "	"	"	....	6025	11/ 4/19	6052	
A–5597	" ...	" "	"	"	....	8026	11/ 4/19	8028	
A–6213	Chas.....	" "	"	"	8256	....	11/21/19	2680	
80									
A–5877	Jax.....	Natl. Oil Co.....	Savannah,	Ga.	....	6065	11/18/19	6052	
A–5878	" ...	" "	"	"	....	8083	11/21/19	8028	
A–6214	" ...	" "	"	"	....	8220	12/ 8/19	4434	
A–6341	" ...	" "	"	"	....	8079	12/ 2/19	8028	
A–6218	Chas.....	Camp. Sup Ofcr.....	Augusta	"	4500	75	12/ 3/19	55450	(CCSTL)
A–659	" ...	Peoples Oil Co.....	.....		....	8397	12/31/19	3010	
					53529	373044			

Inspection fees paid by customer, except the last two items on this page.

Excepting government consignments, inspection fees paid by customers.

L. C. L. Deliveries to U. S. Government as Shown Below.

From—	To—	Year.	Gasoline.	Crystalite.
Atlanta	Camp Supply Officer, Camp Gordon	1919	9109	....
"	Quartermaster, Fort McPherson	1919	43247	1700
"	Camp Exchange, Camp Gordon	1919	2598	590
"	Camp Supply, Camp Jesup	1919	1542	....
Savannah	U. S. Quarantine Sta., Savannah, Ga	1919	1595	162
"	Savannah Quarantine Boat, Savannah, Ga	1919	1015	50
Americus	Q. M. Souther- Field Americus, Ga	1919	1000	350
"	Supplt Officer, Souther Field, Americus, Ga	1919	....	250
Douglas	Q. M. Souther Field, Americus, Ga	1919	39	....
Moultrie	Q. M. Souther Field, Americus, Ga	1919	13	....
Fitzgerald	Camp Supply Officer, Americus, Ga	1919	20	....
Americus	Post Supply Officer, Americus, Ga	1919	2000	....
"	U. S. Health Dept., Sumter Co., Americus, Ga	1919	38	4962
Daytona	Carlstrom Field, Arcadia, Fla	1919	80	....
Augusta	Y. M. C. A., Camp Hancock, Augusta, Ga	1919	2272	295
Savannah	U. S. Engineers, Savannah, Ga	1919	3478	2471
Atlanta	U. S. Quartermaster, Ft. McPherson	1919	....	....
"	Gen. Supply Dept. Warehouse, Atl	1919	30	140
"	Zone Finance Office, Atlanta, Ga	1919	3996	50
Columbus	U. S. Health Service, Columbus, Ga	1919	....	4000
Brunswick	Ordnance Dept., Brunswick, Ga	1919	310	....
Atlanta	Camp Q. M. Camp Jesup, Atlanta, Ga	1919	424	....
Columbus	Motor Transp. Dept., Camp Benning, Col	1919	177282	1460½
Total			250089	16480½

Inspection fees paid by Texas Company.

81 EXHIBIT "B."

The Texas Company.

Request for Inspection.

Atlanta, Ga., April 6th, 1920.

To B. Z. Crane, Inspector of Oils, Athens, Ga.

DEAR SIR:

You are hereby requested to inspect Crystalite now en route to Athens, Ga., as below given, from Mobile:

T. C. X. 4307 ..... Car No. 8224 ..... Gallons
T. C. X. ..... Car No. ..... "
T. C. A. ..... Car No. ..... "
..... Car No. Containing — Drums "
..... Car No. Containing — Drums "

Kindly give above shipment immediate attention upon arrival. Check for Inspection will go forward under separete cover.

THE TEXAS COMPANY,
Per C. T. N.

Copy.

Order No. A—2177.

Sample.

Crystalite and kerosene oil are the same, crystalite being a trade name.

82 Affidavit of J. S. Jones and E. H. Browder, who state that they are respectively Superintendent and Assistant Superintendent of The Texas Company for the State of Georgia and are the highest officers therein.

Affiants reiterate the statements contained in the foregoing deposition of R. M. Ferguson, attaching and making a part of said affidavit Exhibits "A" and "B" attached to said affidavit of R. M. Ferguson and appearing in full in connection therewith.

Affiants further state that, within the State of Georgia, The Texas Company owns but three private tracks, located at Atlanta, Macon and Columbus. At the remaining agencies of said Company, of which there are 34 in Georgia, the original tank cars are delivered on tracks of the several railroads. The bills of lading are issued to the Texas Co. by the railroads for the tank cars.

That no oil or gasoline is produced in the State of Georgia, and unless established with the last few weeks, there is no refinery in the State of Georgia, and all oil or gasoline comes from without the State.

Since the granting of the temporary -straining order in this cause, beginning a few days thereafter, the inspectors in Georgia have refused to inspect oil or gasoline at various agencies in Georgia until after a modification of the order allowing said inspectors to receive their fees and hold the remainder, to which The Texas Company was obliged to consent because of demurrage on cars, interference with business and especially because of its contract to supply the Government at Camp Benning with its products.

Affiants say that the expenses of the State Chemist in Georgia in regard to inspections of oils and gasolines is negligible, his services not being required in as many as 20 cases a year and would not, from all oil companies combined, take exceeding six hours. That his reports show no services so required except under the head of miscellany, that the salary of the State Chemist, affiants are in-
83 formed, is but $3,000 per year, and his whole time is taken up with services due the Agricultural Department, including examination of fertilizers and foods etc. That stationary and stamps would not aggregate exceeding $250.00 per year.

The official published reports of the Commissioner of Agriculture and of the Treasurer of Georgia, obtained from the offices of said Commissioner and Treasurer, are attached and marked Exhibits "M to V," and made a part of the affidavit excepting the last named above.

Whenever kerosene oil or gasoline are sold to the Government in less than carload lots, the inspection fees are paid by the Texas Company, under the system stated, but where tank cars are shipped directly to the Government military posts from points without the state, it is understood by affiant that, the consignee being the Government, no inspection fees were exacted. Since the granting of the restraining order in this case one tank car of gasoline consigned to The Texas Company at Columbus was diverted to Camp Benning, in which case the inspection fee was guaranteed by the Texas Company to the inspector as a condition of inspection.

Exhibits show where shipments were made into adjoining states from Georgia in tank cars, and in every instance the inspection fees had been paid in Georgia, and whenever gasoline or kerosene oil was shipped in any form from Georgia into other states, as shown by exhibits, the inspection fees had been paid in Georgia on the original tank car.

An itemized statement is not made for all of the years since 1914 because of the clerical work involved. On a large proportion of kerosene oil and gasoline shipped from the State of Georgia to other states in tank wagons, the payments were made in cash by customers and the stamps required by said States put on the delivery tag of the customer showing payment of the fees.

Affidavit of C. P. Boardman, Manager of the Peoples Oil Co., of North Augusta, South Carolina, testifying that his Company re-
84 ceives gasoline and kerosene in tank cars which are emptied into their storage tanks, and from them offered for resale. Once each month the oil inspector for Georgia comes to their

office and goes over their books and collects the Georgia tax of one-half cent per gallon on all gasoline and kerosene delivered in the State of Georgia during the month. The inspection of gasoline and kerosene is made at dealers' stations in Georgia and at the storage tanks in North Augusta, S. C. The oil inspector for South Carolina goes over their books and collects the South Carolina tax of one-eighth cent on all gasoline and kerosene sold in the State of South Carolina on which tax has not already been paid by consignor at point of origin.

Affidavit of G. J. Roberts, Agent of the Texas Company at Columbus, Ga., testifying that he has been such agent since 1911, with the exception of nine months when he was in the Navy. That The Texas Company has a private track. When tank cars are shipped to The Texas Company, he receives no bill of lading but a printed slip, a copy of which is sent by the Company to the local oil inspector, together with check for inspection fees, at time of shipment, and nearly always reach Columbus prior to arrival of the car. Said inspector stated to affiant a few days ago that he always expected the notification and check for the inspection fees before the inspection of the kerosene or gasoline. Eight or ten cars of kerosene and gasoline are received by affiant monthly. Invariably inspection is made from the original tank cars which contain approximately 8,000 gallons. The tank cars are delivered on private track of the Company, except in one case recently where the car was diverted to Camp Benning, on which the Texas Company guarantees payment of the inspection fee.

Affiant has never known or heard of any rule for refunding inspection fees paid. He has always understood that kerosene oil or gasoline could not be held for sale, sold or kept in storage without inspection and payment of inspection fee and such course has been universally adopted at Columbus, Georgia.

Affiant ships daily into Alabama gasoline and kerosene by tank wagons and passes on delivery receipt, stamps marked "inspec-
85 tion fee" costing ½ cent per gallon, but which money affiant understands goes to Auburn College, Alabama, and which sum is in addition to the inspection fees charged and paid in the State of Georgia. Affiant thus shipped into Alabama during the month of March (1920) 13,042 gallons of kerosene oil and 600 gallons of gasoline. The inspection tags referred to apply only to kerosent oil, and not on gasoline.

It takes about three minutes to inspect gasoline, which consists in dropping a gravity instrument into the gasoline, and it takes about ten minutes to inspect a sample of kerosene oil.

Affidavits of the Company's agents at Augusta, Richmond Co., Ga., Atlanta, Fulton Co., Ga., Dublin, Laurens Co., Newnan, Coweta Co., Pelham, Mitchell Co., Roswell, Cobb Co., Quitman, Brooks Co., Brunswick, Glynn Co., La Grange, Troup Co., Milledgeville, Baldwin Co., Valdosta, Lowndes Co., testifying to such agency; that the Inspector of Oils in which the Texas Company deals, being kerosene oil and gasoline, inspect same from samples taken from original tank

cars containing about 8,000 gallons in which said products come into the State of Georgia, on the arrival of which said inspector is notified, by affiants that the inspection may take place from the contents of said tank cars. That said tank cars in which said commodities are received come from points without the State of Georgia. After arrival and inspection of said commodities affiants are ready to sell same from said tank cars to any customer, although the usual method of transacting business is to empty the tank cars of kerosene oil or gasoline into storage tanks of the Texas Company, and sell from said storage tanks to customers.

Affiants further testify that there has never been any tank of kerosene oil or gasoline rejected by the local inspector at their respective agencies because of its failure to conform to the specifications prescribed by the Georgia laws.

Also affidavits from the Company's agents at West Point, Troup County, Savannah, Chatham Co., Sandersville, Washington Co., Rome, Floyd Co., Vidalia, Toombs Co., Waycross, Ware Co., Washington, Wilkes Co., Bainbridge, Decatur Co., Athens, Clark
86 Co., Americus, Sumter Co., Griffin, Spaulding Co., Fitzgerald, Ben Hill Co., Cordele, Crisp Co., Columbus, Muscogee Co., Moultrie, Colquitt Co., Monroe, Walton Co., Carrollton, Carroll Co., Albany, Dougherty Co., and Macon, Bibb Co., certifying to the same facts stated in affidavits of agents immediately preceeding, with the additional affirmation by each that he had requested the local inspector of gasoline and kerosene oil to inspect one or both of such commodities at his station, but such inspector declined to do so without payment of the full fee, under instructions, in a majority of instances, of the State Oil Inspector, and in others upon their own judgment.

The Defendant, in reply, offered the following evidence:

Affidavits of J. J. Brown and M. P. Roane, who testified that they, respectively, are Commissioner of Agriculture and General Oil Inspector of the State of Georgia, and have held said offices for the past three years. That as such officers they have charge of the business of inspecting oils, gasoline, etc., and are charged with the duty of enforcing and causing to be enforced the provisions of the laws of the State of Georgia in respect thereto. That the inspection of said products is carried on under their direction and they are familiar with the way and manner of making said inspections and collecting the fees therefor.

That the Texas Company now has 34 local distributing stations in the State of Georgia, at each of which the plaintiff maintains large stationary oil and gasoline tanks, pumps and other apparatus in connection therewith. That practically all of the oils and gasoline sold by Plaintiff in this State are shipped into the State in large tank cars, the property of plaintiff, consigned, and delivered by the railroad companies, to the plaintiff at the various distributing stations on the private or side tracks at said stationary tanks, and when so delivered the contents is conveyed directly from said tank cars into

said tanks and held in stock by plaintiff for the purpose of selling and offering for sale to retail dealers in the State. When
87 sold, said oils and gasoline are delivered by plaintiff to its customers directly from said tanks or by means of wagons or tank wagons, maintained by plaintiff for this purpose, filled from said stationary tanks. All of the oils and gasoline handled by the Texas Company, with the exception of not exceeding two per cent sold direct to customers in this State from places of business without the State, are handled, sold, offered for sale and distributed in this way.

That no oils, gasoline or other products handled by plaintiff are inspected until same have reached their final destination within the State and have been delivered by the railroads to plaintiff or plaintiff's consignees. That usually before a tank car arrives at a local distributing station, plaintiff files a written request with the Local Oil Inspector for inspection of said car upon its arrival, a copy or duplicate of which is forwarded to the General Oil Inspector. Plaintiff has a regular printed form for making these requests, a copy of which is made a part of this affidavit. (See Exhibit "B" to plaintiff's deposition by R. M. Ferguson.)

The invariable rule and practice is that when the car referred to in said written request is delivered by railroad company to and is in the hands of plaintiff, the Local Agent or Manager of that station orally notifies the Local Inspector and requests him to inspect the contents of such car. Such inspection is never made until car has been placed upon private or side track at the stationary tanks for the purpose of being unloaded, and after it has been delivered by the railroad company to said Local Manager or Agent and accepted and received by him. At the time said inspections are made, the cars are in the possession and under the control of the Texas Company or its Local Manager at said station. Then, upon the request aforesaid, the oil and gasoline are inspected by the Local Inspector, in said tank cars, by request of plaintiff, because said products are to be placed in said stationary tanks which already contain other oil or gasoline previously inspected. It is for this reason only, and at the request of plaintiff that said inspection is made in said tank cars, and solely for the benefit of the plaintiff.

Affiants say that it has never been the custom, practice, or a requirement by them that any oil or gasoline be inspected or
88 fees paid before delivery to and in possession of plaintiff or its consignee within this State, but only after same have reached final destination and are no longer in transit, and are being held by the plaintiff or its consignees for the purpose of selling the same or offering them for sale in this State. That affiants construe the laws requiring inspection of oils and gasoline as relating only to oils, gasoline and other products that have ceased to be articles of interstate commerce and are at rest in this State as a part of the mass of property in this State, i. e. intrastate goods and not goods in interstate commerce or in transit in interstate commerce.

Further that affiants, or either of them, has never issued a rule or direction, or authorized any inspector of oil or gasoline to make in-

spection thereof, or to require or demend that said inspection be made or the fees thereof paid, before same reached their destination in this State, or before same are removed from said tank cars. That where said products are shipped directly to purchasers, affiants have never required or demanded, and have no intention of requiring or demanding, that same be inspected and fees paid before delivery to such purchaser for sale or storage. Nor have affiants required or demanded that said oil be inspected even when merely held in storage by such purchaser. Where such oils and gasoline in said tank cars or other original receptacles have been inspected, such inspections were not because of instructions issued by affiants, nor because affiants construed the law to require such inspections to be made, but solely because The Texas Company requested that same be made at said time and place, and solely for the convenience of said Company.

Affiants further says that they have never issued any instructions or orders to said local inspectors to have said oils inspected while the same are in the hands of carriers or while the same are in the hands of the plaintiff to be delivered to such purchasers. It is not now and never has been the intention of affiants to have such oils inspected otherwise than in the hands of such purchasers, and it is not now and never has been his intention to require any one except such a purchaser to have said oils inspected or to pay the fees for such inspection. If the Texas Company has paid fees for the inspec-
89 tion of oil delivered by it to purchasers in this State, directly from its places of business beyond the State, such inspections have been made and such fees paid by the plaintiff voluntarily and without any requirement or demand on the part of this affiant therefor.

Affiants further say that where oils or gasoline are shipped by the plaintiff to brokers in this State, or to persons on consignment in this State, they have never issued any rule or requirement and have never demanded or insisted that the same be inspected or that the fees be paid before the same have been delivered to said broker or person, or are in the hands of such broker or other person, and are being offered for sale by him in this State. If such inspections have been made and such fees have been paid, it was not done in accordance with any requirement on the part of these affiants or any order issued by them or any demand made by them, but was done by The Texas Company voluntarily and at its own request and for its own benefit.

Affiants further say that where oils and gasoline are brought into this State by the Texas Company and consigned to itself at said local distributing station or to the manager of said station, they have never issued any order or requirement, and have never demanded or instructed the local oil inspector to demand that the same be inspected and the fees paid even while the same are in said tank cars. As hereinbefore stated, the practice and custom of making such inspections at said time came about as the result of the requests of the plaintiff to have said inspections made at said time.

Affiants further say that they have always construed said laws to

mean, and now construe them to mean, that said inspections should be made and said fees paid only after the said oils or gasoline have reached their destination in this State and have been delivered to the consignee in this State, and are held in storage by the consignee in this State for the purpose of selling or offering the same for sale in this State. If there are instances where such inspections have been made otherwise and the fees paid otherwise, these things are done without any intention on the part of these affiants, and without their knowledge or consent and without any order or rule or direction issued by them to that effect.

90 Affiants say that it is true that at certain stations, to-wit: at Bainbridge, Augusta, Columbus, and perhaps other places, oil is delivered to said stations and inspected and fees paid thereon, and *and* that for some purpose plaintiff desires to have said oils or gasoline shipped to, or sells the same, in other states, but that they, in all cases brought to their attention refund or cause to be refunded to the owner, dealer or shipper of said oils or gasoline the total amount of said fees paid by him on such oils or gasoline shipped out of this State or sold beyond the limits of this State. That in several instances The Texas Company have reported that goods have been shipped or sold beyond the limits of this State after having been inspected and fees paid thereon, and in each instance affiants have caused the total amount of fees paid by plaintiff on such commodities to be refunded. That they have never undertaken, and have no intention now of undertaking, to forbid the sale and delivery of oil or gasoline by the plaintiff from beyond this State to a purchaser in this State by exacting the payment of said fees or demanding that same be inspected prior to actual delivery to such purchaser. That the invariable rule and practice followed in such case is to take no action until after said products have been actually delivered to such purchaser and after such purchaser offers for sale said products in this State, unless otherwise requested by the plaintiff or by such purchaser. When no such request is received the inspections are made while the said oil or gasoline are in the hands of the purchaser and the fees collected from said purchaser, and not from the plaintiff.

Affidavits of Local Inspectors of Oils at Americus, Sumter Co., Albany, Dougherty Co., Athens, Clarke Co., Atlanta, Fulton Co., Augusta, Richmond Co., Bainbridge, Decatur Co., Brunswick, Glynn Co., Columbus, Muscogee Co., Cordele, Crisp Co., Carrollton, Carroll Co., Dublin, Laurens Co., Douglas, Coffee Co., Fitzgerald, Ben Hill Co., Griffin, Spaulding Co., La Grange, Troup Co., Monroe, Walton Co., Milledgeville, Baldwin Co., Macon, Bibb Co., Moultrie, Colquitt Co., Newnan, Coweta Co., Pelham, Mitchell Co., Quitman, Brooks Co., Rome, Floyd Co., Roswell, Cobb Co., Savannah, Chatham Co., Sandersville, Washington Co., Social Circle, Walton Co., Thomasville, Thomas Co., Valdosta, Lowndes Co., Vidalia, Toombs Co., Waycross, Ware Co., Washington, Wilkes Co., and West

91 Point, Troup County, all in the State of Georgia, certifying that they are such Local Oil Inspectors and have been such for various periods stated: that The Texas Company has and main-

tains, in each of their territories, a local distributing station consisting principally of large stationary tanks, pumps and other apparatus for conveying oil and gasoline from tank cars into said stationary tanks. That there is a private or side track leading from the main line of the railroad to said tanks. Said Company also has and maintains wagons for the delivery of oil and gasoline to its customers from said stationary tanks. That said products come to said stations in large tank cars, consigned to the Texas Company or its manager or agent, which are placed by the railroad on the private or side track and contents conveyed into the stationary tanks, from which it is distributed and sold to patrons, either directly from said tanks, or by means of delivery wagons. All of the oils and gasoline handled by plaintiff are handled and distributed in this way, none being sold or delivered from said tank cars.

Usually before a tank car arrives at such station, affiants, as Inspectors of Oils, receive requests from the Texas Company to inspect same upon arrival. A copy of printed form used for such purpose is made a part of the depositions. (See Exhibit "B" to plaintiff's deposition by R. M. Ferguson.) That the invariable rule and practice is when car referred to in such notice arrives the plaintiff's local manager or agent verbally notifies affiant and requests inspection of such car upon the private or side track; that he never inspects same until it has been placed upon said private or side track at stationary tank; delivered to, accepted and received by and in the possession and control of the local manager or agent of plaintiff, but when so requested does inspect the oil and gasoline in said cars upon said local tracks as aforesaid.

After inspection the oil or gasoline is placed in said stationary tanks by the Texas Company, or its agents, and then distributed to the trade generally. That he has never interfered with the delivery of said tank cars by railroad companies to the consignee, whoever that may be, and never inspects said oil or gasoline until it has been delivered to and in the possession of the consignee, and
92 the transportation thereof has been completed and ended. When said oil and gasoline are placed in said stationary tanks at said station, the same is held by the Texas Company in stock for the purpose of selling the same and offering the same for sale to retail dealers in this State.

That he has never undertaken to forbid the delivery of oil shipped from beyond this State to a purchaser in this State by exacting payment of said fees, or demanding that said oil or gasoline be inspected prior to said delivery to said purchaser.

Affiants, with the exception of those at Douglas, Albany, Monroe and Roswell, say that the Standard Oil Co., and The Gulf Refining Co., have stations at their *stations* local distributing stations, and at the two latter the Standard Oil Co., has local distributing stations, and that their business is conducted in a manner similar to that above described.

Further affidavits from the same Local Inspectors of Oils, with the exception of those at Brunswick, Fitzgerald, Thomasville, Vidalia and Macon, in which affiants say that, to the best of their knowledge

and belief, none of the oils and gasoline shipped by the Texas Company to such points or the territory adjacent thereto, is shipped directly to purchasers or delivered to purchasers directly from said company, either in tank cars or in broken lots.

Affidavits of Local Inspectors of Oils at Brunswick, Macon and Vidalia, Ga., in which affiants say that at Brunswick not more than 10 per cent, at Macon not more than 5 per cent, and at Vidalia not more than ½ of 1 per cent of the oils and gasoline shipped by the Texas Company to such points or the territory adjacent thereto, is shipped by said Company directly to purchasers, or delivered to purchasers directly from said Company, in either tank cars or broken lots. That where such oils and gasoline are shipped directly to such purchasers, affiant, as Oil Inspector, never requires or demands and has never in a single instance required or demanded that same be inspected or the fees paid thereon before same is delivered to such purchaser and is in the hands of such purchaser. In fact,
93 affiant never requires said oil to be inspected even when merely held in storage by purchaser. That he has never inspected oil or gasoline of the Texas Company in tank cars or other original receptacles in which it was brought into the State, except when requested by the Texas Company so to do. While it is true that he has inspected oil and gasoline in said tank cars or original receptacles, he has made such inspection not because of any instructions so to do by the State Oil Inspector or other authority, or because he, as an inspector, construed the law to require said inspection to be made, but solely because of request from and for the convenience of the Texas Company. Affiant only requires and demands that said oils and gasoline be inspected and the fees paid after it is in the hands of such purchaser and after such purchaser sells or offers for sale such oils and gasoline, and the only instances in which this rule is varied is where the Texas Company requests affiant to inspect said oils before the same have been unloaded from said tank cars. Unless so requested, affiant takes no action until the purchaser offers said oils or gasoline for sale or sells the same when it is in his hands and in storage. That he has never undertaken to forbid the delivery of oil shipped by the Texas Company into his territory by exacting payment of fees, or demanding that said oil and gasoline be inspected prior to delivery to the purchaser. That where same are shipped to brokers, or to persons on consignment, he never demands or insists that same shall be inspected or the fees paid until after said oil or gasoline has been delivered to said broker or person and is in their possession, being offered for sale within the State by him, unless requested as stated above.

We agree the within brief contains all the evidence correctly stated that is necessary for purposes of the appeal to the Supreme Court of the United States in the within case. This July 8, 1920.

JOHN M. SLATON,
Attorney at Law for The Texas Co.
JAMES L. NESBITT,
LUTHER Z. ROSSER,
BENJ. Z. PHILLIPS,
STILES HOPKINS,
Of Counsel.

94 BREWSTER, HOWELL & HEYMAN,
MARK BOLDING,
Attorneys for Defendants and Appellees.

The within brief approved and ordered filed as part of the record in the within case.
This July 14, 1920.

SAM'L H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office July 14, 1920.
O. C. FULLER,
Clerk,
By C. A. McGREW,
Deputy.

95 *Opinion on Prayer for Preliminary Injunction.*

SIBLEY, *District Judge*, with whom concurs BEVERLY D. EVANS, *District Judge:*

By a law of Georgia, passed in 1890, Park's Code, Sec. 1800 and following, kerosene and petroleum and products thereof were required to be inspected under specified standards, for which fees were fixed of one-half cent per gallon for lots exceeding 400 gallons, and a larger fee for smaller lots, the fees to be paid monthly into the State Treasury, less certain amounts not to exceed $100.00 per month which the inspectors might retain as their compensation. In 1912 this act was extended expressly to gasoline, benzine and naphtha, Park's Code, Sec. 1809 (*a*). In 1913, Park's Code Sec. 1809 (*e*), the provisions of the last named act were made applicable not only to gasoline, benzine and naphtha sold or offered for sale in Georgia but also to those sold elsewhere and brought into the State of Georgia for consumption or use by the importer. No question upon this last named act arises in this case as the products involved are not imported for consumption by the importer. By a criminal enactment, Park's Penal Code, 642, it is provided "If any person shall sell or keep for sale or in storage any crude or refined petroleum, naphtha, gasoline, benzine or kerosene without having the same inspected and approved by an authorized inspector, he shall be guilty of a misdemeanor."

The petitioner, a corporation of another state, is an importer of

kerosene and gasoline made or bought by it in other states and brought by it in interstate commerce for sale in Georgia, in tank cars of about 8,000 galions each, which sometimes are sold in bulk and sometimes broken for retail, or the contents stored. It is shown and not denied that for years past the receipts by the State from inspection fees have been many times the salaries of inspectors and other costs of inspection, and thereupon it is claimed that the law operates as an unconstitutional burden upon interstate commerce,
96 and that it is also in conflict with the tax provisions of the State constitution, and an injunction is prayed against its enforcement as against petitioner's business.

1. The inspection is obviously an exercise, primarily, of the State's police power. Petroleum products may constitutionally be inspected while still in interstate commerce even at the State line, and an accompanying fee which does not obviously and largely exceed the cost of inspection is a part of the inspection and equally allowable under the police power; Pure Oil Co. v. Minnesota, 248 U. S. 158. A so called inspection fee, however, which obviously and largely exceeds the cost of inspection is not so justifiedand cannot be imposed by a State upon interstate commerce; Standard Oil Co. vs. Graves, 249 U. S. 389; Foote vs. Maryland, 232 U. S. 494. Such a fee, though imposed professedly as an inspection fee and under the police power, is really a tax and must be justified as an exercise of the taxing power, if at all. Accordingly the licensing of occupations, which is properly an exercise of the police power, may be accompanied by the exaction of fees for revenue. Notwithstanding the police guise, these are taxes and stand or fall as such; License Tax Cases, 5 Wal. 462, Royal v. Virginia, 116 U. S. 572. Such exactions may be referable to both the police and the taxing power at the same time and are valid if sustained by either or both powers. "It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfils the two functions, one a regulating and the other a revenue function. So long as the State law
97 authorized both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution." Grundling v. Chicago, 177 U. S. 189. Disregarding names, therefore, and going to the substance, the exaction sub judice, though called a fee and imposed in connection with an inspection, is found not only to greatly exceed the cost of inspection but to have been intended to raise revenue. The charge for inspecting a tank car of petitioner's oil is $40.00 but under the law the inspector can keep but $10.00 for his services; and when his retentions reach $100.00 per month the whole of it is paid into the state treasury. Actual trial of the law has showed, for many years, an income to the state many times the cost of executing the inspection law. The fees were not reduced by the legislature but the law was amended and extended, and the revenue increased and has been spe-

cifically appropriated from year to year to the support of certain public institutions. Both in purpose and in effect, the law is a revenue law. Regarded as such, this case is ruled as to the Federal question by that of New Mexico v. Continental Oil Co., decided by the Supreme Court April 19th, 1920. In that case inspection is not prominent, but a lisence tax was imposed on dealers and in addition an excise tax of two cents per gallon on oil sold or used. But the inspection fee of the Washington Statute dealt with in the Graves case, supra, which is quite similar to the Georgia law, was referred to as a tax because in excess of the cost of inspection, the court saying:

"As to gasoline brought into the State in the tank cars, or in the original packages, and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in Standard Oil Company v. Graves, 249 U. S. 389, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed, what had often — adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from another State into his own State for sale in the original packages, has the right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon
98 this branch of the case we deem it only necessary to refer to that case, and the case therein cited, as establishing the proposition that the license tax upon the sale of gasoline brought into the State in tank cars, or original packages, and thus sold, is beyond the taxing power of the State."

We accordingly hold the Georgia statute unenforcable as against the importations by petitioner intended to be sold in the original packages and so sold.

In the New Mexico case, as to the portion of the plaintiff's business that consisted in selling gasoline at retail, though brought into the State of New Mexico from another State, it was said:

"So long as there is no discrimination against the products of another State, and none is shown from the mere fact that the gasoline is produced in another State, the gasoline thus stored and dealt in, is not beyond the taxing power of the State. Wagner v. City of Covington, decided Dec. 8th, 1919. Sales of the class last mentioned would be a subject of taxation within the legitimate power of the State."

We accordingly hold that the importations of petitioner which are indefinitely stored within the State, or are resold there after breaking the original packages, are subject not only to inspection, but to the tax imposed, so soon as the interstate transportation of them is ended.

The fact that such oils must inevitably meet the tax before they

can be used otherwise than for sale in the original packages is not material. This is true of all general taxation. If there is no discrimination because of their being imported, they pass under the taxing power of the State, as under its protection, so soon as they pass out of interstate commerce by a sale or breaking of the original package by the importer, or by indefinite storage; General Oil Co. v. Crain, 209 U. S. 211; American Steel Wire Company vs. Speed, 192 U. S. 500; Banker v. Pennsylvania, 222 U. S. 210; Bacon v. Illinois, 227 U. S. 502.

The pleaded payment of the general corporation tax for doing business in the State is not a relief from taxes such as these:
99 Home Insurance Co. v. Augusta, 93 U. S. 116. The act imposing the corporation tax, moreover expressly provides that the corporation tax is "in addition to all other taxes now required of them by law" and "the payment of this tax shall not be construed so as to relieve the corporation or agent of any other license or occupation tax whatever;" Acts of 1918, p. 54.

Nor is there any difficulty about the severability of this tax as between taxable and nontaxable oil. Even where a lump sum was laid on a business which included both interstate commerce, which was not taxable, and intrastate business, which was, the tax was held enforce-able as to the latter; Kehrer v. Stewart, 197 U. S. 60. When, as here, there is no lump tax and the subjects of taxation are readily separated as being either interstate commerce or otherwise, no question of severability can possibly arise; Ratterman v. Western Union Tel. Co., 127 U. S. 411, Singer Co., v. Alabama, 233 U. S. 304.

2. Passing to the question of the State Constitution (Railroad Co. v. Garrett, 231 U. S. 301, 303), Article 7 Section 2 provides "All taxes shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." The tax here in question is not ad valorem and if a property tax, is in conflict therewith. While the occasion of the tax is property and its burden falls upon property, and for many purposes the property might be said to be taxed, we think the tax on property referred to in the Constitution is a tax imposed on the ownership of property. In Johnson v. Mayor, 62 Ga., 646, taxes thus levied "for each and every one-horse wagon, one-horse dray or one-horse express wagon hauling in the city, twenty-five dollars; for each two-horse do. fifty dollars," and similar impositions, were held not on property but on business, and not in conflict with the Constitution. A similar ruling was made in Davis v. Mayor, 64 Ga. 128. In the leading case of Atlanta Asso-
100 ciation v. Stewart, 109 Ga. 80, on page 87, while dealing with a State tax of "one dollar for each telephone station or box", it is said:

"Can this be claimed to be a tax on property? There is not the slightest hint that the value of the box or station has any connection with the tax. For a station or box worth twenty-five dollars the company would pay one dollar; for another costing or worth a

thousand dollars it would pay exactly the same. No effort is made to ascertain value, or to deal with property as to its value. The Company might have a building and real estate worth a million of dollars, and furniture and other property worth ten thousand dollars, or it might have no property and operate with rented property, but this clause has no reference at all to property, and would be the same in either case. It simply refers to the number of stations or boxes rented or used. A tax on a person, graduated according to the number of a certain kind of articles, apparatus, or machines employed by him or it, without regard to value, is without question not a property tax, but an occupation tax."

A similar ruling was made as to a tax on gross receipts. The tax on inheritances was held not to be a property tax, but a privilege tax and valid though not ad valorem, in Farkus v. Smith, 147 Ga. 503.

There are difficulties about terming this oil tax an occupation tax, for it is not payable by each person who successively stores or sells the oil. It more resembles excises commonly laid by the United States upon articles and transactions, evidenced by stamps or brands affixed to the articles. Perhaps it is best described by the term "privilege tax," used by the Supreme Court of the similar inspection fees in the Graves case. The legislature, by reason of the danger of oils whose qualities are uncertain, might have prohibited the storage or sale of them, and certainly could unless they be inspected. The privilege of storage and sale after inspection is what the tax is for. But it is unnecessary to name it, if it be not a property tax.

The other provision "taxation shall be uniform on the same class of subjects" is not offended. The peculiarities of oils and the handling thereof are such as to make them reasonably a subject of classification. Since the law requires the inspector to travel as
101 much as thirty miles to inspect, expenses and mileage being paid by the State (Park's Code, 1805), it is evident that inspection of the smaller lots of oil might be at a loss. There is thus reason for the sub-classification as to a quantity with a higher fee for smaller lots; Sawtell v. Atlanta, 138 Ga. 687; Farkus v. Smith 147 Ga. 503. The Georgia Constitution forbids no form or mode of taxation generally permissible, but only requires specified uniformities. The form of taxation by excessive fees for so-called inspection of many articles, has been for many years resorted to for revenue. Many public officers have been put *put* on salaries and their fees which exceed their salaries required to be turned into the treasury. This long continued and unquestioned practice, in the absence of any decision by the State courts, would make us reluctant to declare the act in question contrary to the State Constitution. It will accordingly be adjudged that the collection of inspection fees, so called, be enjoined and restrained in respect to oils imported by the petitioner for sale in the original package and so sold, and an injunction will be refused as to oils imported for indefinite storage or for sale after breaking the original package.

WALKER, *Circuit Judge* (dissenting in part):

I concur in the conclusion that, as to oil imported by the plaintiff for sale in the containers in which it is brought into the State, and so sold, the collection of the inspection fees should be enjoined; but I do not concur in the conclusion that, as to oil imported for use or sale, the prescribed fees may be exacted upon the removal of such oil from the containers in which it was imported.

I am unable to find any basis in the provisions of the statute in question for the conclusion that it is anything but an
102 inspection measure. The fees prescribed cannot well be considered as exacted for anything but inspection where nothing is required but inspection and payment of it, the payment not conferring on the payer any right or privelege not equally possed*des* by others who, without paying such fees, may use, keep or store for sale, or otherwise deal in the inspected oil. The statute is materially different from the one which was passed on in the case of Askren, et al., v. Continental Oil Co., U. S. Sup. Ct., April 19, 1920. The statute there in question was held to impose a tax upon the privilege of dealing in gasoline in the State of New Mexico. It did not require any inspection of gasoline. It imposed a tax on the privilege of dealing in that commodity. It was held that so far as such dealing was in imported gasoline while still in the containers in which it was imported it was not subject to the tax. The statute now in question exacts the payment of fees for inspecting oil, and does not tax oil as property in Georgia or the privilege of dealing in it there. By it the police power of requiring oil to be inspected before it is used or sold is so exercised as to be the means of raising a large revenue for the State. To sustain the statute to the extent indicated in the foregoing opinion requires the affirmance of the proposition that, as to imported goods, which, with intent to use or sell them, have been removed from the original containers in which they were brought into a State, a charge for inspection grossly in excess of the expense involved may be exacted as the price of such goods becoming the subject *or* lawful use or disposition in the State. In Standard Oil Co. v. Graves, 249 U. S. 389, it was decided that such an inspection charge on imported goods is an unauthorized burden on interstate commerce, "certainly while the same are in the original reseptacles or containers in which they are brought into the State."

So far as the writer is informed it has not been authorita-
103 tively decided that the payment of an excessive inspection fee may be made the price of protecting imported goods, even after they have been stopped in a State and been removed from the containers in which they were brought in, from being treated as contraband or outlawed. If such an obstacle may be put in the way of imported commodities acquiring the beneficial qualities of property, the prohibition of interference with interstate or foreign commerce may easily be defeated. If such an exaction is not subject to the limitation imposed on inspection charges, then all imported commodities, whether properly subject to inspection or not, may be subjected to such exactions as a State may choose to impose as condi-

tions precedent to their acquiring the capacity of being lawfully dealt in. As to such a commodity the charge amounts to a toll on the movement of it into domestic commerce. It is believed that as to oil coming from beyond the borders of the State the limit of the allowable toll on its transition into intrastate commerce is the reasonable expense of ascertaining if it is fit for use or sale. It is not questioned that, as to imported goods which have been removed from the original containers in which they were imported, a State has the power of taxing either the goods as property, or the carrying on of any business or the exercise of any privilege in which the goods figure. This does not amount to saying that a State has the additional power of charging what it pleases as the price of such goods becoming the subject of lawful commerce or dealings within its borders. If a State can require the payment of such fees as those in question, it also may exact similar payments before shoes, hats, calico, nails, horse-collars, or any kind of commodity can be used or sold. It is not believed that such an exaction properly can be regarded as a property, occupation, or privilege tax. No property, occupation, or privilege is taxed. If, on the ground that it is possible for a commodity to have its origin in a State, it may be subjected to such charges for inspection, there is an easy way of creating an obstacle to any imported commodity entering into the com-
104 merce of a State. No commodity which is a proper subject of inspection can be moved with the required freedom from one State into another if it is subject to such an exaction as the one in question. If such an exaction can be made without being kept within the limit fixed for inspection charges, any commodity coming into a State from beyond its boarders may be met by a similar barrier. A denial of the State's right to make such exaction does not amount to a denial of its taxing power or of its polise power of making reasonable regulations for the protection of its people.

Filed in Clerk's Office, 28th day of June, 1920, 12.55 P. M.
O. C. FULLER,
Clerk.
By JON DEAN STEWARD,
Deputy.

105 *Order Granting Temporary Injunction.*

The above cause coming on for hearing and determination upon a prayer for preliminary injunction before the Honorable Richard W. Walker, Circuit Judge, Beverly D. Evans and Samuel H. Sibley, District Judges, after argument and consideration of the case, for the reasons stated in an opinion filed herewith,

It is considered, ordered and decreed that a temporary injunction be granted pending the further hearing of the cause, restraining the defendants and each of them, by themselves or their agents, from collecting the inspection fees, so called, upon or in respect to kerosene oil, gasoline or other petroleum products of plaintiff, mentioned in the petition, which are imported into the State of Georgia from

other States and intended to be sold in the original packages in which imported and so sold; but that as to such products which are so imported for indefinite storage within the State of Georgia, or for sale after breaking the original package, after completion of the interstate transportation, a preliminary injunction is denied and the restraining orders heretofore granted dissolved. This order to go into effect ten days from this date unless sooner appealed from.

This June 28th, 1920.

SAM'L H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office 28th day of June, 1920, 12.55 p. m.
O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy.

106 *Petition for Appeal.*

To the Honorable Samuel H. Sibley, United States Judge for the Northern District of Georgia, and the Special Tribunal:

Whereas heretofore a restraining order was granted in said cause on the application of the plaintiff, and

Whereas thereafter the application of the plaintiff for an interlocutory injunction was referred by the Honorable Samuel H. Sibley, United States Judge for the Northern District of Georgia, to a special tribunal composed of Hon. Samuel H. Sibley, United States Judge for the Northern District of Georgia, Hon. Beverly D. Evans, United States Judge for the Southern District of Georgia and Hon. Richard W. Walker, United States Circuit Judge for the Fifth Judicial Circuit, and

Whereas after due notice said application for temporary injunction against the defendants came on to be heard the 23rd day of April, 1920 before said special tribunal, and

Whereas on the 28th day of June, 1920 the injunction was partly granted against said defendants and in part declined by said district judges, the circuit judge dissenting therefrom,

Now comes the defendant the Texas Company and prays an appeal from the judgment and decree aforesaid rendered by the said majority of said tribunal, to the Supreme Court of the United States, because said injunction was not granted as prayed for by the complainant The Texas Company and said The Texas Company submits its assignments of error and prays for a reversal of said judgment and decree to the extent that it declines the full relief prayed for by complainant, and prays that the writ of injunction be granted in accordance with the prayers of complainant's petition and for such other relief as may be proper.

Complainant The Texas Company shows that if a supersedeas be not granted until the United States Supreme Court has passed upon the appeal, it will be remediless, since in the meantime the

107 inspection fees would have been paid into the Treasury of the State of Georgia, from which it could not be withdrawn, and The Texas Company prays a supersedeas upon condition that it give bond upon such terms and for such amount as the court may determine to be just and proper, and for such other relief as complainant may be entitled to.

THE TEXAS COMPANY,
By JOHN M. SLATON,
Its Solicitor and Attorney at Law.
JAMES L. NESBITT,
LUTHER Z. ROSSER,
BENJ. Z. PHILLIPS,
STILES HOPKINS,
Of Counsel.

Filed in Clerk's Office 6th day of July A. D., 1920.
O. C. FULLER
Clerk,
By JON DEAN STEWARD,
Deputy.

108 *Assignments of Errors.*

Now comes the complainant, The Texas Company and as part of the foregoing petition for appeal, assigns as errors committed by the said special tribunal in declining to grant the injunction prayed for and thereon pray that the judgment and decree of said special tribunal may be reversed insofar as it declines the full relief prayed for by complainant, and prays that the case be remanded with instructions to grant the injunction and full relief prayed for by the complainant, to-wit:

1. Because it appears by the bill of complaint and the admissions of the answer and because it is a fact that the laws of Georgia require as a condition to selling, holding for sale or holding in storage in Georgia, of oil, gasoline and petroleum products, all of which are imported into the State of Georgia, payment of inspection fees for testing the quality and safety of said products in an amount from five to six times its cost of inspection, thereby burdening interstate commerce within the meaning of the Federal Constitution, article 1, section 8, paragraph 3, and the said laws are void in their entirety on that account and the said Special Tribunal erred in holding to the contrary.

2. Because said inspection fees imposed by the laws of Georgia for the avowed purpose of testing the quality and safety of oil and gasoline, none of which admittedly are produced in Georgia and which inspection fees were five or six times the cost of inspection, constituted unfair and arbitrary discrimination against importers of said

products and created a burden upon them not imposed upon others in Georgia dealing in said products, and said Special Tribunal erred in not so holding and in holding to the contrary.

109 3. Because the inspection fees imposed by the State of Georgia are declared by the laws of said State and are in effect solely inspection fees arising from the exercise of the police power in determining the quality and safety of petroleum products and are in no sense a tax either occupational or a privilege tax, but are inspection fees imposed only upon the importer, and the Special Tribunal erred in not so holding and in holding to the contrary.

4. Because the Act of the Legislature of Georgia of 1912 amended prior acts on the subject of oil inspection and constituted with other legislation set out in the bill, an integer to be construed with the entire legislation on the subject and said act of 1912 providing that petroleum products brought into the State not for the purpose of being offered for sale but for use or consumption of the purchaser shall pay inspection fees and said act of 1912 should be considered in determining the intention of the Legislature of Georgia in imposing said inspection fees and should be considered in construing said legislation on said subject and the Special Tribunal erred in not so holding and in specifically disregarding the same.

5. Because said inspection fees are imposed only upon persons bringing said petroleum products into the State of Georgia or holding them in storage or for sale the first time, and said fees do not constitute an occupational or privilege tax but violate the Constitution of Georgia, article 7 section 2 paragraph 1, if viewed as a tax at all, because not uniform upon the same class of subjects in that only the importer was held to pay such fees, and the Special Tribunal erred in not so holding.

6. Because said inspection fees being avowedly for the purpose of paying the cost of inspection in order to determine the safety of gasoline, kerosene oil and naphtha, and being admittedly five or six times the cost of said inspection, amounts to a taking of property without process of law within the meaning of the Fourteenth Amendment of the Federal Constitution of the State of Georgia, and the Special Tribunal erred in not so holding.

110 7. Because the Legislature of the State of Georgia requiring the payment of inspection fees of ½ cent per gallon for lots of 400 gallons and upwards and 1 cent per gallon for quantities between 200 to 400 gallons and 1½ cent- per gallon for quantities less than 200 gallons, produced five or six times the cose of inspection and the same being imposed only on the introducers of said products into the State of Georgia, the criminal statutes enforcing said legislation and the entire legislation upon the subject constitutes an integer and is void because in violation of the commerce clause of the Federal Constitution and should be declared void and the enforcement of said acts should be enjoined and the Special Tribunal erred in not

declaring the same void and enjoining their enforcement as prayed for in complainant's bill.

THE TEXAS COMPANY,
By JOHN M. SLATON,
Its Solicitor and Attorney at Law.
JAMES L. NESBITT,
LUTHER Z. ROSSER,
BENJAMIN Z. PHILLIPS,
STILES HOPKINS,
Of Counsel.

Filed in Clerk's Office 6th day of July, A. D., 1920.
O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy Clerk.

111 *Order Granting Appeal, and Supersedeas.*

This cause having come on to be heard this 6th day of July, 1920, upon the petition of the complainant The Texas Co., for an appeal to the Supreme Court of the United States from the interlocutory decree of the special tribunal to which it was submitted, granting in part the temporary writ of injunction and declining in part the injunction prayed for by complainant against the defendants and each of them to restrain them from enforcing or attempting to enforce the particular laws of the State of Georgia which are the subject matter of the bill of complaint herein, the defendants appearing by their counsel and the complainant appearing by its counsel, and the court having seen and considered the assignments of error exhibited with the petition for appeal;

It is ordered, that the appeal be and the same is hereby granted, to the Supreme Court of the United States, from the judgment and decree aforesaid:

It is further ordered that the supersedeas be granted as prayed, upon the plaintiff making bond in the sum of Ten Thousand ($10,000) Dollars, with good and sufficient security that plaintiff in error shall prosecute his appeal to effect and answer all damages and costs if it fail to make its plea good. Said bond shall be liable for such amount as may be sufficient to cover the value of the use and detention of the inspection fees in question and the costs of suit and just damage for delay and costs and interest on the appeal.

It is further ordered that the original restraining order of date the 18th of March, 1920, as modified by the order of the 6th of April, 1920, be continued in force until this appeal be determined, the same operating thereby as a supersedeas and maintaining the status.

112 It is further ordered that the Clerk of the United States District Court for the Northern District of Georgia, without delay, make and transmit to the Clerk of the Supreme Court of the United States a full and true transcript of the proceedings in said cause, including the complaint and its amendments, the answers and

their amendments and all motions therein, together with the evidence and affidavits therein filed, the restraining orders and their modifications, the bond therefor, the opinion of the two District Judges granting the temporary injunction together with the dissenting opinion of the Circuit Judge, the petition for appeal and the assignment of error, the order granting the appeal and the bond provided by order of court.

This 6th day of July, 1920.

SAML. H. SIBLEY,
United States District Judge for the Northern District of Georgia.

Filed in Clerk's Office 6th day of July, A. D., 1920.
O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy Clerk.

113 *Supersedeas Bond.*

Know all men by these presents: That we The Texas Co., a corporation of the State of Texas, as principal, and United States Fidelity & Guaranty, a corporation duly authorized to make bonds in the courts of the United States, as surety, are held and firmly bound unto J. J. Brown, individually and as Commissioner of Agriculture of Georgia, W. J. Spear, individually and as Treasurer of Georgia, M. P. Roane, S. H. Tift, J. E. Hightower, B. A. Crane, Chas. D. Dodd, M. C. Jones, D. R. Bower, Sam E. Brown, J. H. Burson, W. W. Hunt, H. C. McKenzie, C. H. Kittrell, G. W. Herrington, Guy Clopton, G. L. English, S. G. Woodall, J. B. Turner, F. W. Hazelhurst, C. L. Moran, J. M. Williams, Robt. L. Shipp, T. J. Fisher, J. H. Phillips, J. C. Whipple, A. W. Ledbetter, T. G. Perkins, J. E. Johnson, G. W. Heriot, J. N. Doris, J. S. Hopkins, W. L. Fenders, J. M. Gilbert, H. P. Brewer, J. H. Booker, and G. B. Meadows, their successors and assigns, in the full and just sum of ten thousand dollars, to be paid to said obligees, their successors and assigns, for which payment well and truly to be made we bind ourselves our heirs, executors, administrators and successors, jointly and severally by these presents, sealed with our seals and dated this 6 day of July, 1920.

Whereas, lately on the 28th day of June, 1920, a special tribunal under section 266 of the United States Judicial Code, composed of Honorable R. W. Walker one of the Circuit Judges of the United States Circuit Court of Appeals of the Fifth Judicial Circuit, Honorable Samuel H. Sibley, United States Judge for the Northern District of Georgia, and Honorable Beverly D. Evans, United States Judge for the Southern District of Georgia, in a matter pending before it for a temporary injunction on the application of the said Texas Co., as plaintiff and the obligees as defendants, judgment was rendered and an order made for an interlocutory writ of injunction

against said obligees and also refusing in part the injunction prayed for and the said principal the Texas Co., having obtained allowance of an appeal to the Supreme Court of the United States to reverse said judgment and order in the aforesaid suit which is pending in the District Court of the United States for the Northern Dis-
114 trict of Georgia, to the extent that said judgment did not grant to complainant the Texas Co., the full relief prayed for and on said appeal a supersedeas having been granted to complainant the Texas Co., upon condition that it give a bond with good and sufficient security, and

Whereas a Citation directed to the said obligees admonishing them to be and appear before the Supreme Court of the United States at the City of Washington in the District of Columbia sixty days from and after the date of said application,

Now, the condition of the above obligation is such that if said The Texas Co., shall prosecute said appeal to effect and pay all costs if they fail to make good said plea, and comply with the terms of the order of supersedeas, then said obligation to be void, else to remain in full force and effect.

THE TEXAS COMPANY,
By Its Solicitor and Att'y at Law,
JOHN M. SLATON, [SEAL.]
Principal.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
Security.
By FRANK H. REYNOLDS, [SEAL.]
Att'y-in-Fact.
[Corporate Seal.]

STATE OF GEORGIA,
County of Fulton:

On this 6 day of July, 1290, before me personally appeared John M. Slaton, to me well known to be the same person described in and who executed the foregoing bond in behalf of and for the principal, the Texas Co., therein named.

In Witness whereof I hereunto set my hand and notorial seal the day and year in this certificate written.

WM. B. HARTSFIELD, [SEAL.]
Notary Public, Fulton County, Georgia.

My Commission expires June 9, 1923.

115 STATE OF GEORGIA,
County of Fulton:

On this 6 day of July, 1920, before me a Notary Public in and for said State and County, personally appeared Frank H. Reynolds, to me personally known, who being by me duly sworn, upon oath did say that he is Agent and attorney in fact of and for the United States Fidelity & Guaranty Co., a corporation of Baltimore, Maryland,

created, organized and existing under and by virtue of the laws of the State of Maryland, that the corporate seal affixed to the foregoing and within instrument is the seal of said Company, that the said seal was affixed and the said instrument was executed by authority of its Board of Directors and he the said Frank H. Reynolds did acknowledge that he executed said instrument as the free act and deed of said company.

WM. B. HARTSFIELD, [SEAL.]
Notary Public, Fulton County, Georgia.

My Commission expires June 9, 1923.

Order Approving Bond and Granting Supersedeas.

The foregoing bond and security furnished thereby are hereby approved and the petition for appeal with the supersedeas prayed for are hereby granted.
This July 6, 1920.

SAML. H. SIBLEY,
U. S. Judge.

Filed in Clerk's Office, 6th day of July, A. D. 1920.
O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy Clerk.

116 Filed in Clerk's Office 6th Day of July, 1920. O. C. Fuller, Clerk, by Jon Dean Steward, Deputy.

In the District Court of the United States, Northern District of Georgia.

Citation.

United States of America to J. J. Brown, individually and as Commissioner of Agriculture of Georgia; W. J. Speer, individually and as Treasurer of Georgia; M. P. Roane, S. H. Tift, J. E. Hightower, B. A. Crane, Chas. D. Dodd, M. C. Jones, D. R. Bower, Sam E. Brown, J. H. Burson, W. W. Hunt, H. C. McKenzie, C. H. Kittrell, G. W. Herrington, Guy Clopton, G. L. English, S. G. Woodall, J. B. Turner, F. W. Hazelhurst, C. L. Moran, J. M. Williams, Robt. L. Shipp, T. J. Fisher, J. H. Phillips, J. C. Whipple, A. W. Ledbetter, T. G. Perkins, J. E. Johnson, G. W. Heriot, J. N. Doris, J. S. Hopkins, W. L. Fenders, J. M. Gilbert, H. P. Brewer, J. H. Booker, and G. B. Meadows, Greeting:

You are hereby cited and admonished, to appear in the Supreme Court of the United States at the City of Washington in the District of Columbia sixty (60) days after this citation bears date, pursuant to the appeal allowed and filed in the office of the Clerk of the United

States District Court for the Northern District of Georgia, wherein the Texas Company a corporation of the State of Texas is appellant and you are appellees, to show cause, if any there be, why the decretal order rendered against said The Texas Co. as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness the Honorable Samuel H. Sibley, Judge of the United States District Court for the Northern District of Georgia, this 6 day of July, 1920.

[Seal of the U. S. District Court, N. D., Georgia.]

SAM'L H. SIBLEY,
U. S. Judge for the Northern District of Georgia and One of the Judges Constituting the Special Tribunal in said Cause under Section 266 of the Judicial Code and the Judge to Whom the Original Bill Was Presented.

Due service of the above and foregoing citation on appeal is hereby admitted, this 6 day of July, 1920.

BREWSTER, HOWELL & HEYMAN,
MARK BOLDING,
Attorneys for Appellees.

117 *Præcipe.*

To the Clerk of the United States District Court for the Northern District of Georgia:

Please prepare a transcript of record of the said case on appeal to the Supreme Court of the United States, containing the following items:

1. The Bill of Complaint.
2. The 3 Amendments of Plaintiff.
3. The Answer of Defendants.
4. The two Amendments of Defendant's Answer.
5. The Temporary Restraining Order.
6. Defendant's Motion to make Bill more specific.
7. The Modification of Temporary Restraining Order.
8. Bond for Restraining Order.
9. Order continuing hearing and restraining order until April 17th, 1920.
10. Order of Reference to Three Judges.
11. Brief of Evidence and affidavits introduced at the hearing.

12. The Opinion of Judges Sibley and Evans on the grant of temporary injunction and the dissenting opinion of Circuit Judge R. W. Walker.

13. The Order of the Special Tribunal granting in part and declining in part a temporary injunction.

14. The Petition for Appeal.

15. The Assignments of Error.

16. The Order granting the Appeal and Supersedeas.

17. The Supersedas and Cost Bond.

18. The Citation on Appeal with Acknowledgment of Service thereon.

19. This Præcipe.

118 20. The Clerk's Certificate and certificate of costs.

THE TEXAS COMPANY,
By JOHN M. SLATON,
Its Attorney at Law.
JAMES L. NESBITT,
LUTHER Z. ROSSER,
BENJ. Z. PHILLIPS,
STILES HOPKINS,
Of Counsel.

It is hereby stipulated and agreed by and between counsel for the parties to the above entitled cause that the above and foregoing præcipe calls for the preparation of the transcript of record in said cause containing all matters necessary or proper for the consideration of said cause on appeal to the Supreme Court of the United States.

This July 6, 1920.

THE TEXAS COMPANY,
By JOHN M. SLATON,
Its Attorney at Law.
DEFENDANTS IN ERROR,
By BREWSTER, HOWELL & HEYMAN,
MARK BOLDING,
Their Att'ys at Law.

Filed in Clerk's Office 7th day of July, 1920.

O. C. FULLER,
Clerk,
By JON DEAN STEWARD,
Deputy.

119 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Northern District of Georgia,
Northern Division:

I, Olin C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia, do hereby certify that the foregoing and attached 118 pages of printing and writing contains a true copy of the record, Petition for Appeal, Assignments of Error, Original Citation with Acknowledgment of Service thereon and all proceedings in the case of The Texas Company versus J. J. Brown, individually and as Commissioner of Agriculture of Georgia, et al., being No. 143 In Equity, as specified in the Præcipe of counsel therein as fully as the same remains of record and on file in my office at Atlanta, Georgia, except that the Original Citation with Acknowledgment of Service thereon is included therein in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of said District Court of Atlanta, Georgia, this 27th day of July A. D., 1920.

[Seal of the U. S. District Court, N. D., Georgia.]

OLIN C. FULLER,
Clerk United States District Court for the Northern District of Georgia.

Endorsed on cover: File No. 27,853. N. Georgia D. C. U. S. Term No. 496. The Texas Company, appellant, vs. J. J. Brown, individually, and as Commissioner of Agriculture of Georgia, et al. Filed August 20th, 1920. File No. 27,853.

Office Supreme Court, U. S.
FILED
JAN 28 1921
JAMES D. MAHER,
CLERK.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1920

No. 126

THE TEXAS COMPANY,
Plaintiff in Error,

vs.

J. J. BROWN, *et al.*,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR

JAMES L. NESBITT,
of New York City,

LUTHER Z. ROSSER,
JOHN M. SLATON,
BENJ. Z. PHILLIPS,
STILES HOPKINS,
of Atlanta Ga.,

Attorneys for Plaintiff in Error.

JOHNSON-DALLIS CO., PRINTERS, ATLANTA, GA.

TABLE OF CONTENTS

Pages

BRIEF AND ARGUMENT ---------- 1-72
The Facts ---------- 3-12
The Laws ---------- 3-8
The Complaint ---------- 8-12
The Issue ---------- 12-13
The Argument ---------- 14-72
The Law to be Construed as Providing for Inspection, Not for a Privilege or Excise Tax ---------- 14-24
The Right to Sell an Integral Part of Interstate Commerce ---------- 24-42
The Law Void as Establishing an Occupation, License or Excise Tax ---------- 42-57
The Law Void as Violative of Fourteenth Amendment ---------- 57-59
The Law Void as Violative of State Constitution ---------- 59-64
Relief Prayed ---------- 64-67
Summary ---------- 68-72

APPENDIX ---------- i-xx
Laws and Statutes:
Code of Georgia 1910 Civil ---------- i-viii
Code Sections 1800-1813, Inclusive.
Code of Georgia 1910 Penal ---------- ix-xi
Code Sections 637-642(c), Inclusive, and 1065.
Acts 1912, p. 59 ---------- xi-xiii
Amending Code Section 1800.
Acts 1912, p. 149 ---------- xiii-xvi
Inspection of Gasolines, Benzines, Naphthas, Fees, Tests, Etc.
Acts 1913, p. 110 ---------- xvi-xvii
Inspection, Fee Schedule Amended, Etc.
Acts 1918, p. 164 ---------- xviii-xix
Inspection of Gasoline, Benzine, Naphtha, Etc.
Acts 1918, p. 53-54 ---------- xix-xx
Foreign Corporations, Tax, Etc.

TABLE OF CASES

Pages

Adams adv. Postal T. C. Co., 155 U. S. 688 ---------- 50

American Fert. Co. v. Board of Agriculture, 43 Fed. 609 ---------- 42

American Steel & Wire Co. vs. Speed, 192 U. S. 500--- 51

Arkansas adv. St. L. So. Ry. Co., 235 U. S. 350------- 59

Asbell v. Kansas, 209 U. S. 251 ---------- 18

Askren v. Continental Oil Co., 40 Sup. Ct. Rep. 355---- 54 55, 56, 72

Bacon v. Illinois, 227 U. S. 504 ---------- 52

Barber adv. Minnesota, 136 U. S. 313 ---------- 43

Bartels Northern Oil Co. v. Jackman, 150 N. W. (N. Dak.) 576 ---------- 32, 64

Beckett v. Savannah, 118 Ga. 58 ---------- 60

Board of Agriculture adv. Amer. Fert. Co., 43 Fed 609 ---------- 42

Board of Agriculture adv. Patapsco, Etc., 171 U. S. 345 ---------- 18

Botkin adv. Kansas, 240 U. S. 227 ---------- 59

Bricker adv. Singer S. Mach. Co., 233 U. S. 304------- 67

Brimmer v. Rebman, 138 U. S. 78---------- 27, 43, 45

Brown v. Houston, 114 U. S. 622 ---------- 49

Brown v. Maryland, 12 Wheat. 419 ---------- 25, 46

Case of State Freight Tax, 15 Wall. 232 ---------- 43

Castle v. Mason, 110 N. E. (Ohio) 463 ---------- 33

Chicago T. Co. adv. Raymond, 207 U. S. 20---------- 57

Chicago adv. Gundling, 117 U. S. 183 ---------- 41

Colley, et al., adv. York Mfg. Co., 247 U. S. 21----- 37, 54

Commissioners adv. Shepperd, 59 Ga. 535 ---------- 62

Connolly v. Union Sewer Pipe Co., 184 U. S. 540--- 57, 59

Continental Oil Co. adv. Askren, 40 Sup. Ct. Rep. 355--- 54 55, 56, 72

Pages

Cope adv. Sioux Remedy Co., 235 U. S. 197 36
Cotting v. Kansas City Stock Yds., 183 U. S. 79..... 59
Crain adv. General Oil Co., 209 U. S. 211..... 28, 29, 32
Crew Levick & Co. v. Pennsylvania, 245 U. S. 292.. 43, 50
Cutliff v. Mayor, et al., 60 Ga. 597 62
Davis v. Mayor, 64 Ga. 128 62
Denver, etc., R. R. adv. McLean, 203 U. S. 38..... 18
Ellis v. Gulf C. & S. Ry., 165 U. S. 150..... 59
Foote & Co. v. Maryland, 232 U. S. 494 22
26, 27, 28, 29, 32, 34, 35, 65, 66
Galveston H. & S. Co. v. Texas, 210 U. S. 217..... 59
Garrett adv. L. & N. Ry., 231 U. S. 298 60
Garza adv. Neilsen, 2 Woods 287, Fed. Cas. 10,091..... 29
General Oil Co. v. Crain, 209 U. S. 211..... 28, 29, 32
Gibbons v. Ogden, 9 Wheat. 1 25
Graves adv. Standard Oil Co., 249 U. S. 389 16
17, 18, 19, 20, 22, 24, 29, 32, 56, 72
Greene adv. Southern Ry. Co., 216 U. S. 400 57
Gulf C. & S. Ry. v. Ellis, 165 U. S. 150 59
Gundling v. Chicago, 177 U. S. 183 41
Hardin adv. Leisy, 135 U. S. 100 ..... 18, 45, 47, 51
Hopkins adv. Yick Wo., 118 U. S. 356 41
Houston adv. Brown, 114 U. S. 622 49
Illinois adv. Bacon, 227 U. S. 504 52
Jackman adv. Bartels N. Oil Co., 150 N. W. (N. Dak.) 576 ..... 32, 63
Johnston v. Macon, 62 Ga. 645 70
Jones adv. Savage, 225 U. S. 501 ..... 49, 50
Kansas adv. Asbell, 209 U. S. 251 18
Kansas v. Botkin, 240 U. S. 227 59
Kansas City Stock Yds. adv. Cotting, 183 U. S. 79..... 59

Pages

Kehrer v. Stewart, 117 Ga. 969 ---------- 71
L. &. N. Ry. v. Garrett, 231 U. S. 298 ---------- 60
Lamar v. McLaren, 107 Ga. 591 ---------- 14
Leisy v. Hardin, 135 U. S. 100 ---------- 18, 45, 47, 51
Lowe adv. Peck & Co., 247 U. S. 165 ---------- 51
Lyng v. Michigan, 135 U. S. 161 ---------- 45
McLaren adv. Lamar, 107 Ga. 591 ---------- 14
McLean v. Denver, etc., R. R., 203 U. S. 38---------- 18
Macon adv. Johnston, 62 Ga. 645 ---------- 70
Maryland adv. Brown, 12 Wheat. 419 ---------- 25, 46
Maryland adv. Foote & Co., 232 U. S. 494 ---------- 22
26, 27, 28, 29, 32, 34, 35, 65, 66
Mason v. Castle, 110 N. E. (Ohio) 463 ---------- 33
Mayor, et al., adv. Cutliff, 60 Ga. 597 ---------- 62
Mayor v. Davis, 64 Ga. 128 ---------- 62
Mayor adv. Waring, 8 Wall. 110 ---------- 48
Michigan adv. Lyng, 135 U. S. 161 ---------- 45
Michigan adv. Walling, 116 U. S. 446 ---------- 47, 49
Minnesota v. Barber, 136 U. S. 313 ---------- 43
Minnesota adv. Pure Oil Co., 248 U. S. 158 ---------- 23
29, 35, 55, 65
Missouri adv. Welton, 91 U. S. 275 ---------- 45, 48
Neilsen v. Garza, 2 Woods 287, Fed. Cas. 10,091------ 29
North Carolina adv. Red C. Oil Co., 222 U. S. 380----- 18
28, 29
Oak Creek adv. U. S. Glue Co., 247 U. S. 321---------- 50
Ogden v. Gibbons, 9 Wheat. 1 ---------- 25
Patapsco G. Co. v. Board of Agriculture, 171 U. S. 345 ---------- 18
Peck & Co. v. Lowe, 247 U. S. 165 ---------- 51
Pennsylvania adv. Crew L. & Co., 245 U. S. 292----- 43, 50
Pennsylvania adv. Schollenberger, 171 U. S. 1--- 31, 36, 47

Pages

Postal T. C. Co. v. Adams, 155 U. S. 688 50
Postal T. C. Co. v. Taylor, 192 U. S. 64 35
Pure Oil Co. v. Minnesota, 248 U. S. 158.. 23, 29, 35, 55, 65
Ratterman v. Western U. T. Co., 127 U. S. 411..... 67
Raymond v. Chicago T. Co., 207 U. S. 20..... 57
Rebman v. Brimmer, 138 U. S. 78 ..... 27, 43, 45
Red C. Oil Co. v. North Carolina, 222 U. S. 380.. 18, 28, 29
Robbins v. Shelby T. Dist., 120 U. S. 489..... 43
Royall v. Virginia, 116 U. S. 572 40
Royster, F. S. Guano Co. v. Virginia, 40 Sup. Ct. Rep. 560 58
Savage v. Jones, 225 U. S. 501 ..... 49, 50
Savannah adv. Beckett, 118 Ga. 58 60
Savannah v. Weed, 84 Ga. 683 61
Schollenberger v. Pennsylvania, 171 U. S. 1.... 31, 36, 47
Shelby T. Dist adv. Robbins, 120 U. S. 489..... 43
Shepperd v. Commissioners, 59 Ga. 535..... 62
Singer S. Mach. Co. v. Bricker, 233 U. S. 304 67
Sioux Remedy Co. v. Cope, 235 U. S. 197..... 36
Smith adv. Wofford Oil Co., not reported..... 37, 45
Southern Bell T. & T. Co. adv. Wright, 127 Ga. 227.. 62, 70
Southern Railway Co. v. Greene, 216 U. S. 400..... 57
Speed adv. Amer. Steel Wire Co., 192 U. S. 500 51
St. Louis So. Ry. Co. v. Arkansas, 235 U. S. 350..... 59
Standard Oil Co. v. Graves, 249 U. S. 389,..... 16
17, 18, 19, 20, 22, 24, 29, 32, 56, 72
State Freight Tax, Case of, 15 Wall. 232..... 43
Stewart adv. Kehrer, 117 Ga. 969 71
Swift & Co. v. United States, 196 U. S. 375..... 49
Taylor adv. Postal T. & C. Co., 192 U. S. 64..... 35
Texas adv. Galveston H. & S. Co., 210 U. S. 217..... 59

Pages

Union Sewer Pipe Co. adv. Connolly, 184 U. S. 540 ... 57, 59
United States adv. Swift & Co., 196 U. S. 375 ... 49
United States Glue Co. v. Oak Creek, 247 U. S. 321 ... 50
Virginia v. Royall, 116 U. S. 572 ... 40
Virginia adv. Royster Guano Co., 40 Sup. Ct. Rep. 560 ... 58
Virginia adv. Webber, 103 U. S. 344 ... 43
Walling v. Michigan, 116 U. S. 446 ... 47, 49
Waring v. Mayor, 8 Wall. 110 ... 48
Webber v. Virginia, 103 U. S. 344 ... 43
Weed adv. Savannah, 84 Ga. 683 ... 61
Welton v. Missouri, 91 U. S. 275 ... 45, 48
Western Union Tel. Co. adv. Ratterman, 127 U. S. 411 ... 66
Wofford Oil Co. v. Smith, not reported ... 37, 45
Wright, Comp. Gen. v. So. Bell Tel. & Tel. Co., 127 Ga. 227 ... 62, 70
Yick Wo v. Hopkins, 118 U. S. 356 ... 41
York Mfg. Co. v. Colley, et al., 247 U. S. 21 ... 37, 54

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1920

No. 496

THE TEXAS COMPANY,
Plaintiff in Error,

vs.

J. J. BROWN, *Et Al.*,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

The plaintiff in error brought this action in the United States District Court for the Northern District of Georgia, to enjoin J. J. Brown, the Commissioner of Agriculture, M. P. Roane, General Oil Inspector, and thirty-four local oil inspectors from enforcing the oil inspection laws of Georgia, and to have the same declared void and uncon-

stitutional. The State Treasurer was made a party defendant to prevent him from accepting and putting into the treasury the inspection fees in excess of the cost of inspection.

The defendants answered the petition admitting the essential allegations on which plaintiff's bill and amendments to the bill were based.

Judge R. W. Walker, the Circuit Judge, and Judge Beverly D. Evans from the Southern District of Georgia, were requested to assist Judge Sibley of the Northern District of Georgia, in hearing the case.

After hearing the three Judges united in adjudging that "the collection of inspection fees, so-called, be enjoined and restrained in respect of oil imported by the petitioner for sale in the original package and so sold." The majority of the Judges refused an injunction "as to oils imported for indefinite storage or for sale after breaking the original package."

The Circuit Judge filed a dissenting opinion, holding that an injunction should have been granted as to oil imported for use or sale and in effect holding that the plaintiff was entitled to the relief prayed.

Thereupon plaintiff in error prosecuted this appeal on the ground that it was entitled to the full relief prayed.

THE FACTS.

The Laws:

The last Code of Georgia, both civil and penal, was adopted in 1910 and contains the statutes in force up to that time. Until 1912 provision was made only for the inspection of kerosene and illuminating oils; but in 1912 and in subsequent years the provisions for inspection of kerosene oil were made to apply to gasoline and kindred products. All the legislation on the subject is contained in plaintiff's bill and amendments and is printed as an appendix to this brief.

The first law ever passed in Georgia relative to the inspection of oils is that contained in Georgia Laws of 1870, page 398, and is entitled:

"No. 259

"AN ACT TO PROTECT THE PEOPLE OF THIS STATE IN THE SALE OF KEROSENE OIL"

It is amended in administrative particulars and is codified in the Penal Code of Georgia of 1910.

The first law in Georgia codified in the Civil Code, on the subject of oil inspection is contained in the Acts of the Legislature of 1880, page 152, and is entitled as follows:

"INSPECTION OF COAL AND PETROLEUM OILS

"No. 326

"AN ACT TO PROVIDE FOR THE BETTER SECURITY OF LIFE AND PROPERTY FROM THE DANGERS OF COAL AND PETROLEUM OILS."

By the Constitution of Georgia the title is an essential part of a legislative act and the Constitution provides that "no act shall contain matter different from what is expressed in the title of the Act." Constitution of Georgia, Article 3, section 7, paragraph 8.

All the legislation in Georgia on the subject of inspection of oils is built up by amendment upon these original acts of 1870 and 1880 and is thus to be interpreted by the title of these acts as intended "to provide for the better security of life and property."

The original act of 1880 was amended mainly in administrative particulars until the Code of 1910, since which time gasoline and petroleum products for similar use are included in the domain of inspection by acts beginning with the year 1912.

These facts are recited as sustaining the contention of the plaintiff in error that the Georgia laws are to be construed as inspection laws, intended to provide safety rather than revenue, and this view is emphasized by their environment in the Code of 1910, being under the "Thirteenth Title" thereof, headed "Regulations for

Particular Branches of Trade and Agriculture" and being preceded by laws dealing with the inspection of fertilizers and cotton seed meal, and succeeded by provisions for the inspection of turpentine and naval stores.

The construction contended for by plaintiff in error is further sustained by the fact that the enforcement of these inspection laws is put in charge of the Department of Agriculture, which has nothing to do with the fiscal or taxing powers of the State.

All of these laws are to be construed as an integer dealing with the same subject matter as an entirety and intended to protect the public.

The criminal laws of Georgia dealing with the subject and codified in the Criminal Code are in part as follows: (Rec. 12.)

> "639. ILLEGAL SALE OF ILLUMINATING FLUIDS. Any person who shall sell or offer for sale any of the illuminating fluids designated in section 1809 of the Civil Code, in violation of the provisions of said section, shall be guilty of a misdemeanor.
>
> "642. SALE OF UNINSPECTED OIL. If any person shall sell, or keep for sale or in storage, any crude or refined petroleum, naptha, kerosene, earth-rock, coal, machine, or illuminating oil, the products of petroleum, earth-rock, or coal-oil, without having the same inspected and approved by an authorized inspector, he shall be guilty of a misdemeanor."
>
> "642 (a). LABELING GASOLINE, BENZINE OR NAPHTHA. Any manufacturer, dealer or vender,

failing to comply with the provisions of section 1809 (c) of the Civil Code, in regard to labeling casks, barrels or packages, containing gasoline, benzine or naphtha shall be deemed guilty of a misdemeanor, and upon conviction therefor, shall be punished as prescribed in section 1065 of this Code."

"642 (b). ADULTERATION OF GASOLINE, BENZINE OR NAPHTHA. Any manufacturer, vender or dealer who shall adulterate any gasoline, benzine or naphtha, as described in section 1809 (c) of the Civil Code, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished as prescribed in section 1065 of this Code."

"642 (c). LABELS ATTACHED TO PACKAGES BY RETAILERS. Any retailer violating the provisions of sections 1809 (f) and 1809 (g) of the Civil Code, with regard to attaching labels to barrels, casks, cans or packages containing gasoline, benzine or naphtha, shall be punished with a fine of not more than fifty dollars or imprisoned not to exceed thirty days, one or both, in the discretion of the court."

A misdemeanor is punishable in Georgia by a fine not exceeding $1,000, and imprisonment not to exceed six months or to work in the chain gang 12 months. Any one or more of these punishments, in the discretion of the Judge. See Criminal Code 1065. (Rec. 15.)

The Georgia laws provide that the whole subject of oil inspection shall be under the Commissioner of Agriculture, who appoints all local inspectors, and next to him in authority is his appointee, the General Oil Inspector. (Rec. 5 et seq.)

The local inspectors shall be sufficient in number to insure "the inspection of oils throughout the State." See section 1805. (Rec. 6.)

The Georgia laws provide the test which kerosene oil shall meet (Rec. 7) and the compensation for inspection (Rec. 8-9) and that the inspectors, after subtracting their compensation, shall remit the balance to the State Treasurer.

It will be noted that plaintiff imports its oil and gasoline into the State in tank cars containing 8,000 gallons, and the inspection fee thereon is $40.00. (Rec. 46.) It takes ten minutes to inspect a tank car of gasoline and about twenty minutes to inspect a tank car of kerosene.

The Georgia laws further provide for the reference of disputes to the State Chemist as to the correctness of tests. (Rec. 8.) They provide for the branding of inspected oil. (Rec. 9.)

It is made the duty of the General Inspector to prosecute violators of any provisions of the law regarding inspection of oils. (Rec. 9.) Inspectors may enter any place where oils are kept for sale and may reinspect without charge (Rec. 8) and shall inspect tanks of retail dealers whether previously inspected or not. (Rec. 8.) By act of 1912 the Legislature provided for the inspection of gasoline and for the compensation of inspectors, and made gasoline subject to the same supervision and control as illuminating oils, and provided additional misdemeanor penalties for violation of the various provisions of the act. (Rec. 10.)

By act of 1913 it was provided that the act of 1912 should apply, "not only to gasoline, benzines and naphthas sold or offered for sale in the State of Georgia, but likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia for consumption or use where such commodities or any of them may be purchased within the State or without the State and brought into the State by any person, firm or corporation, not for the purpose of sale or offering the same for sale, but for the purpose of use or consumption by the purchaser in manufacturing or other lawful uses, either as fuel or otherwise, the inspections herein prescribed shall be made and the fees above fixed shall be paid therefor, except no purchaser shall pay more than $1,200 per annum for the inspection of such commodities used or consumed by him as aforesaid." (Rec. 20.)

The Complaint:

Plaintiff in error is a corporation organized under the laws of Texas and authorized to do business under the laws of Georgia, having paid the occupation tax provided by section 951 of the Code of Georgia, as amended by the act of 1918, pages 53 and 54, which increased the amount of the occupation tax. (Rec. 16.)

A pertinent part of the act and of the amendment of 1918 is that the tax is therein described as an "annual license or occupation tax."

The nature of the business of plaintiff in error is described as follows:

"5. Plaintiff is engaged in the business of manufacturing, refining, buying and selling petroleum and the products thereof and in such business as selling and offering for sale in the State of Georgia, kerosene oil and gasoline of the character and quality embraced in and made the subject of the provisions of the laws of Georgia set forth in full herein."

"6. In and about the conduct of said business by the plaintiff it has brought and is daily bringing into the State of Georgia for the purpose of offering for sale and selling the same, large quantities of gasoline and kerosene oil meeting the tests required by the laws of Georgia."

"7. Said products of kerosene oil and gasoline are mainly brought into the State of Georgia by this plaintiff in tank cars containing about 8,000 gallons each and are inspected under the laws herein set out before being emptied therefrom. Plaintiff maintains in the State of Georgia, tanks, warehouses, buildings, machinery and other equipment for receiving, shipping, handling, selling and distributing said products, shipped as herein stated into the State of Georgia. None of said products can be sold or offered for sale except upon compliance with the laws herein set out."

"9. The business conducted by plaintiff therefore constitutes interstate commerce, all of their aforesaid products being brought from points without the State of Georgia into the State of Georgia as stated." (Rec. 4.)

The bill further sets forth that plaintiff is bringing into the State of Georgia approximately one million gallons per month of gasoline and approximately from six to seven hundred thousand gallons of kerosene per month.

Plaintiff in error not only sells by retail but sells direct to customers in full tank car lots, all of the shipments being from points without the State. When the shipments are made in full tank car lots to the customers within the State the oil is inspected by local inspectors and in some instances the customer pays the inspection fee and in other instances the plaintiff pays the inspection fee, and the price is determined by the question as to who shall pay the inspection fees. (Rec. 24.) See paragraph 3 of amendment of April 17th.

The fees collected under the inspection laws have been increasing rapidly from the year 1914 to the year 1920. It is apparent that the fees prior to 1912 when only kerosene oil was provided for in inspection fees, were negligible.

The fees collected from plaintiff for inspection of kerosene oil in 1914 were $6,018.27 and for inspection of gasoline $7,772.55. Rapidly increasing each year, they reached $16,458.02 for inspection of plaintiff's kerosene in 1919 and $63,071.53 for inspection of its gasoline in 1919. See paragraph 18 of plaintiff's bill. (Rec. 13.)

Plaintiff's bill shows, in paragraphs 19 to 24 (Rec. 13) that the general inspection fees in 1914 exceeded the cost of inspection by $117,461.39. In 1915 by the sum of $127,994.28. In 1916 by the sum of $166,306.71. In 1917 by the sum of $217,378.38. In 1918 by the sum of $310,471.19. In 1919 by the sum of $357,503.76, and the General Oil Inspector estimates the profits from this source for the year 1920 to be $400,000.00.

Plaintiff's bill alleged (paragraph 27) (Rec. 14) that the sums paid as inspection fees amounted to from five to six times the cost of inspection.

All of these allegations of fact in plaintiff's bill are either admitted or are undisputed under proof.

It is specifically admitted by defendants that the inspection fees are from five to six times the cost of inspection and the official receipt from inspection fees by the Treasury of the amounts named is admitted.

Plaintiff's bill further alleges, and the allegation is admitted, that when the surplus inspection fees are paid by the inspectors into the State treasury, the money cannot be paid out except by act of the Legislature of Georgia and that the State cannot be sued.

It was plead as a matter of fact that the fees, by reason of the great excess in the amounts thereof over the cost of inspection are in violation of the Constitution of the United States and more particularly of clause 3, section 8, article 1, section 1 of the 14th Amendment to the Constitution of the United States, and in violation of the Constitution of the State of Georgia, article 1, section 1, paragraph 3, providing that no person shall be deprived of life, liberty or property except by due process of law, and in violation of article 7, section 2, paragraph 1 of the Constitution of Georgia, providing that "all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

It was further plead by the plaintiff and admitted by defendants that no oil or petroleum products were produced in Georgia and there were no refineries unless they had been established without the knowledge of plaintiff within the last few weeks prior to the filing of the bill.

THE ISSUE.

The issue is whether the State of Georgia, in which petroleum is neither produced nor its products manufactured, can demand excessive inspection fees, and whether the inspection laws of Georgia can be construed as a privilege, an excise or occupation tax, and if so, whether such tax can be levied on the original sale in that state of petroleum and its products.

The court below in reply to the admitted contention that the inspection fees were excessive, took the position that the legislation was sustainable as a privilege or excise tax on the sales of oil in Georgia.

Under the laws oil once inspected is free to move in the channels of trade. Therefore the so-called privilege tax is payable only by those who seek to make the original sale of oil in Georgia. Plaintiff in error takes the position: First, that the Georgia laws are inspection laws and are to be construed from that standpoint as an exercise of the police power of the State and that as inspection laws the fees are grossly excessive and their exaction is discriminative and a burden on interstate commerce. Second, that as legislation levying an excise or

privilege tax on original sales of oils shipped into the State of Georgia from other states, the act burdens interstate commerce and is arbitrary and discriminatory in its nature. Third, that as a purported tax on the privilege of making original sales of oil in Georgia the tax is unequal and contrary to the fourteenth amendment; in other words, that the classification between those making the first sales and those making the subsequent sales of the same product is arbitrary and not sustainable by reference to a reasonable exercise of the taxing power of the State. It may be noted here that the Legislature of Georgia contemplated no such discrimination. It provided for inspection fees. The lower court, to sustain the legislation, created a classification which distinguishes the occupation of making original sales of oil from the occupation of making subsequent sales of the same oil. The lower court held that this legislation taxed the former occupation. This unusual classification is the result, not of a legislative purpose, but of an attempt to sustain the inspection fees as a privilege tax. Fourth, the legislation is void as being violative of the Constitution of the State of Georgia, article 1, section 1, paragraph 3, providing that no person shall be deprived of life, liberty or property except by due process of law and in violation of article 7, section 2, paragraph 1, of the Constitution of Georgia, providing that all taxation shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws.

ARGUMENT.

THE GEORGIA LEGISLATION IS TO BE CONSTRUED AS PROVIDING FOR INSPECTION AND NOT FOR A PRIVILEGE OR EXCISE TAX.

The original statutes of 1870 and of 1880 on which by various amendments the pertinent legislation of Georgia is built and which are codified in the Code of Georgia, show clearly that the purpose of the legislation is to protect life and property and is meant to exercise the police power of the State to that end. The title of the acts constitute in Georgia a part of the legislation and the act under the Constitution of Georgia can contain nothing not expressed in the title. See Constitution of Georgia, article 3, section 7, paragraph 8, as follows, to-wit: No law or ordinance shall pass which refers to more than one subject matter or sustains matter different from what is expressed in the title thereof.

The legislative acts when they become sections of the Code through codification, preserve their original meaning and are so interpreted.

Lamar vs. McLaren, et al., 107 Ga. 591.

The Legislature, when it passed the laws up until the year 1912, did not anticipate revenue from inspection fees. It will be seen from the admitted figures that the receipts from inspection fees up to the time that provision was made for the inspection of gasoline, were very small. Even after 1912 it took several years to demonstrate that the fees which were intended to cover the cost

of inspection would be a tremendous source of revenue, and it is undoubtedly true that the Legislature knew after two or three years of experience that the fees, intended for inspection only, had become a source of tremendous revenue and that the revenue from inspection was several times its cost.

If the oil inspection fees were intended as a general source of revenue, fairly imposed upon the business of selling oil, it is hardly conceiveable that the Legislature would have imposed such fee as an excise tax solely upon the first sale instead of upon every one selling oil and its products.

The court below found trouble in sustaining the legislation on the theory that the inspection fees constitute an occupation, an excise or a privilege tax. It said:

> "There are difficulties about terming this oil tax an occupation tax for it is not payable by each person who successively stores or sells the oil. It more resembles excises commonly laid by the United States upon articles and transactions evidenced by stamps or brands affixed to the articles. Perhaps it is best described by the term 'privilege tax' used by the Supreme Court of the similar inspection fees in the Graves case. The Legislature, by reason of the danger of oils, whose qualities are uncertain, might have prohibited the storage or sale of them and certainly could, unless they be inspected. The privilege of storage and sale after inspection is what the tax is for. But it is unnecessary to name it if it be not a property tax."

This last sentence is employed because if the tax be a property tax it is inevitably violative of the provision of

the Georgia Constitution requiring all property taxes to be ad valorem.

In the case of *Standard Oil Co. vs. Graves*, 249 U. S. 389, the Supreme Court distinctly reverses the Supreme Court of Washington in its endeavor to maintain the excessive inspection fees as an occupation tax, using the following language (page 394):

> "The Supreme Court of the State held the tax was not upon property but could be sustained as an excise or occupation tax upon the business of selling oil within the State. While this Court follows the decisions of the highest court of the State as to the meaning of statutes in cases of this character, the name given to a statute is not conclusive; it must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void."

This position is untenable because the privilege of storage after inspection occasions no charge against any citizen who stores after inspection, but constitutes a charge only against the original importer.

As evidence that the oil inspection fees are not imposed as an occupation tax, the plaintiff shows that it has paid the occupation tax required by the laws of Georgia from foreign corporations. See Section 951 of Code of Georgia, as amended by the Act of 1918, pages 53 and 54. (Rec. 16.)

It is true that the code section and the amendment by terms impose this occupation tax on corporations, "in addition to all other taxes now required of them by law."

The purpose of this provision is to allow counties and municipalities to also impose license fees for the transaction of business in their respective localities and also to prevent the payment of the occupation tax from being construed as a tax in lieu of ad valorem taxes. But there is no other instance of which we are aware where a double occupation tax is imposed by the State for the privilege of doing business by a foreign corporation, should the inspection fees be construed as an occupation tax. The very purpose of the occupation tax is to pay for the privilege of doing business in the State of Georgia and no reason appears why oil companies should be, or could be, singled out as the sole ones upon whom shall be placed the burden of twice paying an occupation tax for which general provision had been made by a statute that seemed to be all comprehensive so far as said occupation taxes were concerned.

If these laws are inspection laws in fact, the Federal Court will so construe them, even though a State court might have differently designated them. In Georgia, however, neither the Supreme Court nor any State court has passed upon the question, and the United States Supreme Court in the instant case will not have to construe legislation in the light of a State court decision as it had to do in the case of *Standard Oil Co. vs. Graves*, 249 U. S. 389.

Is then the Statute sustainable under the police power of the State as an inspection law?

The court below did not undertake to sustain it as an inspection law, apparently recognizing that controlling

authority prevented its constitutionality when so viewed.

It may be conceded at the outset that the police power of the State is sufficient to justify reasonable inspection laws and their application to products of interstate commerce.

> *Leisy vs. Hardin*, 135 U. S. 100;
> *McLean vs. Denver & Rio Grande R. R.*, 203 U. S. 38;
> *Patapsco Guano Co. vs. Board of Agriculture*, 171 U. S. 345;
> *Asbell vs. Kansas*, 209 U. S. 251.

It is our earnest contention that the limit of such authority is, as was very recently stated by this Court through its Chief Justice:

> "To impose a fee solely to recompense the State for the expense properly incurred in enforcing the authorized inspection." *Red C Oil Co. vs. N. C.*, 222 U. S. 380, page 394.

The instant case is indistinguishable from that of *Standard Oil Co. vs. Graves*, 249 U. S. 389. That is the final expression of the United States Supreme Court in the evolution of the law on the subject of excessive inspection fees, and its rendition is prophesied in other decisions of the Court to which we shall refer.

The Graves case disposes finally of the proposition that this inspection fee is an occupation tax, because the Supreme Court of Washington in seeking to maintain the excessive inspection fees held them to be an occupation

tax which the Supreme Court of the United States says was not true, in the following language (page 394):

> "The Supreme Court of the State held the tax was not upon property but could be sustained as an excise or occupation tax upon the business of selling oil within the State. While this court follows the decisions of the highest court of the State as to the meaning of statutes in cases of this character, the name given to a statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void."

In the case of *Standard Oil Co. vs. Graves,* 249 U. S. 392, the bill alleged:

> "That plaintiff is engaged . . . . . Its products of petroleum are shipped from its refineries in California into the State of Washington where the same are sold by this plaintiff in large quantities for use and consumption in the State of Washington for illuminating, manufacturing, domestic and power purposes . . . . . Plaintiff maintains in the State of Washington, wharves, docks, tanks, warehouses, buildings, machinery, horses and wagons and other equipment for receiving, shipping, handling, selling and otherwise disposing of said products shipped as aforesaid from the State of California into the State of Washington."

Therefore, the bill plainly and by necessary intendment states that with horses and wagons it distributes to its customers the products shipped from California into the State of Washington for use and consumption by the people of Washington and that the tanks and warehouses

are but the equipment for the distribution by wholesale and retail of the products of petroleum.

The law in Washington which was attacked, provided, that the petroleum product

> "Before being sold or offered for sale, shall be inspected by the State Oil Inspector or his deputies."

And further that if

> "any manufacturer, vendor or dealer or agent or representative of any manufacturer, vendor or dealer shall sell or attempt to sell to any person such product intended for use or consumption within this State that has not been inspected and branded according to the provisions of this Act, he shall be guilty of a misdemeanor."
>
> *Standard Oil Co. vs. Graves*, 249 U. S. 392.

Therefore the law which was attacked in the Graves case provided in terms that the inspection law applied only to that product "intended for use or consumption within this State."

It will be observed that the law of Georgia is much stronger. In Georgia it is provided (Sect. 642 of Code) (Rec. 12):

> "If any person shall sell or keep for sale or in storage any crude or refined petroleum, etc., without having the same inspected and approved by an authorized inspector, he shall be guilty of a misdemeanor."

The law of Georgia further provides (Sect. 1809 of Code) (Rec. 7):

> "No person shall manufacture or have in his possession, or sell or give away for illuminating or heating purposes, etc."

By the Act of 1913 (Rec. 20) it was provided that the Act of 1912 requiring inspection should apply

> "not only to gasoline, benzines and naphthas sold or offered for sale in the State of Georgia, but likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia for consumption or use where such commodities or any of them may be purchased within the State or without the State and brought into the State by any person, firm or corporation, not for the purpose of selling or offering the same for sale, but for the purpose of use or consumption by the purchaser."

All of the inspection laws of Georgia are set out and it will be seen from their language that without incurring either criminal penalties or other heavy liability, The Texas Co. could not keep, sell, offer for sale or store any of its petroleum products without the same being inspected and subjecting itself to the payment of the excessive inspection fees.

It is admitted that all of the plaintiff's products come into the State in original tank cars containing approximately 8,000 gallons each. It is admitted that no petroleum products originate in Georgia and there are no refineries in Georgia, unless one has been established within a few weeks prior to the filing of the bill.

It is admitted that before the emptying of the tank cars of the plaintiff, the inspection is made from the

original tank cars; in fact the statute contemplates that the plan of procedure set forth in the bill should be complied with by any importer of petroleum products. (Code, Sect. 1808) (Rec. 6.)

With these facts admitted, the Graves case in the 249th U. S., demands a declaration by this court that the inspection laws of Georgia be declared void.

The Supreme Court in the Graves case, *supra*, says:

> "The cost of the inspection was greatly less than the tax imposed. The general principle that the State may not impose burdens upon interstate commerce is so well settled and has been so often declared in the opinions of this court that a repetition of the reasons which have induced these decisions would be superfluous. In this case the amended complaint alleges that the oils were shipped into Washington from California. *They are brought there for sale.* This right of sale as to such importations is protected to the importer by the Federal Constitution. Certainly while the same are in the original receptacles or containers in which they are brought into the State."

Page 395:

> "That inspection fees so grossly in excess of the cost of inspection imposed upon articles brought into the State in interstate commerce, are unconstitutional, was held in *Foote & Co. vs. Maryland*, 232 U. S. 494."

The Supreme Court, in the Graves case, intended to make a finality of the subject and quotes on page 396, with approval, the principle stated in the Foote case as

recognized in *Pure Oil Co. vs. Minnesota*, 248 U. S. 158. The Court says (249 U. S. 396):

> "But if such inspection fees should be obviously and largely in excess of the cost of inspection, the Act will be declared void because constituting in its operation an obstruction to and burden upon that commerce among the States, the exclusive regulation of which is committed to Congress by the Constitution."

The Court declares that the Washington statute (249 U. S. 397) "necessarily imposes a direct burden upon such commerce" and cites with approval the decisions of North Dakota and Ohio, to which reference is hereafter made.

It is a fact that under the Georgia statutes the inspectors have the right to order the oil to be emptied from the tank cars into barrels before inspection, but they did not exercise this right. While this is true, a practical reason why such right was not exercised is that the compensation of the inspectors is not increased for so doing, and in addition the legal aspect of the case would not be altered at all by the imposition of such a burden.

Presumably the inspectors did not exercise the right because it is unnecessary to do so for proper inspection, and because the inspectors did not wish to unnecessarily impose this heavy burden of emptying and reemptying the oil with consequent leakage, upon the importer.

However, it will immediately occur to this Court that the legal situation would not be changed if the inspectors,

in the process of collecting excessive inspection fees should order the emptying of the contents from the original package. The barrels into which such contents had been compulsorily emptied would be equally protected with the original tanks and if such were not the case the protection of the commerce clause of the Federal Constitution could always be evaded.

THE RIGHT TO SELL IS AN INTEGRAL PART OF INTERSTATE COMMERCE.

It will be observed that the Court in the Graves case determined to make an end of this growing habit of raising revenue out of interstate commerce under the guise of collecting inspection fees, and it uses a phrase (p. 374) which is pregnant with significance in distinguishing inspection cases from taxing cases.

> "The oils were shipped into Washington from California. *They are brought there for sale.* This right of sale as to such importations is protected to the importer by the Federal Constitution."

The Court will notice in the various inspection cases cited in this brief that the language is used that the product shall be inspected "before sale or before it is offered for sale." In Georgia the same language is used, excepting it is also provided that it shall not be kept on storage and the inspection fees are further put upon one purchasing oils from without the State for his own consumption.

Therefore, necessarily these fees are connected with the

first sale or offer of sale or the mere importation alone of such products and not with the general business of selling such products. After the products have been inspected and received the brand of the inspector they may be sold anywhere and by anybody in the State, but the inspection fees and the burden of inspection are put upon the first sale only.

The purpose of commerce is sale. The purpose of the Texas Co. in shipping oil into the State of Georgia is to sell it. Its original sale is taxed. The right of sale is a necessary incident to the right to engage in interstate commerce.

As early as *Gibbons vs. Ogden*, 9 Wheat. 1, the Supreme Court held that the power of Congress over interstate commerce did not cease at the state line.

In *Brown vs. Maryland*, 12 Wheat. 419, a license tax on importers of foreign articles was held unconstitutional. Chief Justice Marshall said (pages 438-9):

> "There is no difference in effect, between the power to prohibit the sale of an article and the power to prohibit its introduction into the country. The one would be the necessary consequence to the other. No goods would be imported if none could be sold."

Page 446:

> "commerce is intercourse—one of its most ordinary ingredients is traffic. To what purpose should the power to limit importation be given, unaccompanied by the power to authorize the sale of the thing imported. Sale is the object of importation

> and is an essential ingredient of that intercourse of which importation constitutes a part."

The decision in the Graves case was foreshadowed and rendered absolutely necessary by the decision of *Foote vs. Maryland*, 232 U. S. 494, rendered by Mr. Justice Lamar, an ex-Judge of the Supreme Court of Georgia.

In that case the State of Maryland attempted an imposition of fees for the inspection of oysters in excess of the cost of such inspection. The Maryland law provides (232 U. S. 495) a charge of 1¢ per bushel "upon all oysters unloaded from vessels at the place where said oysters are to be no further shipped in bulk in vessels." It will be observed from this language that the inspection was to be made of oysters that were unloaded—not still on ships, but upon "oysters unloaded" and presumably unloaded for purposes of sale by retail and wholesale just as in the case that oils are.

The State of Maryland endeavored to justify this fee on the ground that the cost of inspection of oysters, together with policing the oyster beds, would approximate in cost the amount raised from the inspection of oysters. Mr. Justice Lamar said (232 U. S. 504):

> "Still effect must be given to the provision in the Constitution which in unusual and emphatic terms permits the State to collect only what is 'absolutely necessary.' If, therefore, it be shown that the fees are disproportionate to the service rendered or that they include the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void because such cost by nec-

essary operation obstructs the freedom of commerce among the States."

It will be observed that the Supreme Court, speaking through Mr. Justice Lamar, interprets the commerce clause of the Federal Constitution in the light of the impost clause of that instrument, and sustains this citation with numerous decisions (pages 504-5). He refers to the case of *Brimmer vs. Rebman*, 138 U. S. 78, dealing with an inspection tax of the State of Virginia and holds:

> "Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the states, including Virginia, for a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states including the people of the State enacting such statute."

In the case of *Foote vs. Maryland*, 236 U. S. 503, the Court said that if there was an overlapping of inspection and policing

> "It must be made to appear that such tax does not materially exceed the cost of inspection—the burden in such cases being on those seeking to collect the combined charge, for if the cost of inspection is so intermingled with other expenses as to make it impossible to separate the two, interstate commerce may be burdened by fees collected both for inspection and revenue—for a lawful and an unlawful purpose."

That decision of the Supreme Court, page 508, ends with this pregnant language:

> "The excess (of inspection fees over cost of inspection) may have been valid as a tax on property in Maryland, but was a burden on interstate commerce when levied upon oysters coming from other states. This fact renders the whole tax void because there is no claim that the intrastate can be separated from the interstate shipments or that the legislature would have taxed one and left the other untaxed."

The above quotation renders clear the decision in the case of *General Oil Co. vs. Crain*, 209 U. S. 211, and also guides this court in its determination and also sustains the position that the entire oil inspection of Georgia is void and cannot be sustained in part and in part enjoined.

The case of *Foote vs. Maryland* was foreshadowed by the case of *Red C Oil Co. vs. North Carolina*, 222 U. S. 380. This case was finally decided by this Court on the ground that the inspection fees were not shown to be in excess of the cost and the legislative act imposing the fee had gone into effect only two days before the bill was filed and the Supreme Court said that it would be presumed if the fee were too large that the "necessary correction will be made to cause the act to conform to the authority possessed, which is to impose a fee solely to recompense the State for the expense properly incurred in enforcing the authorized inspection (page 394).

It will be noted that the statute in the Red C Oil Co. case was applicable to petroleum products sold or offered for sale in the State of North Carolina.

Mr. Justice Bradley, in *Neilson vs. Garza*, 2 Woods 287, Federal Cases No. 10,091, said:

> "If any State, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws."

That petroleum products do not originate in the State of Georgia nor are refined there, is admitted in the pleadings.

The case of *General Oil Co. vs. Crain*, 209 U. S. 211, is quoted as authority against the plaintiff. This is a case preceding the cases of *Red C Oil Co. vs. North Carolina*, 222 U. S. 380; *Foote vs. Maryland*, 237 U. S. 494; *Pure Oil Co. vs. Minnesota*, 248 U. S. 158 and *Standard Oil Co. vs. Graves*, 249 U. S. 389.

In the Crain case a large part of the opinion of the Court was taken up with the discussion as to whether the Supreme Court of the United States had jurisdiction.

In that case the plaintiff was a Tennessee corporation, and the bill alleged it brought in oils from other states and the inspection fees charged in Tennessee were excessive. It alleged that it kept two tanks into which it emptied its oil. No. 1 tank contained oil for which orders had already been received from other states. Number 2 tank contained oil to be sold in other states, but for which no orders had been received. The demurrer as to tank Number 1 was overruled, but as to tank Number 2 the demurrer was sustained.

It appeared that the oil had already been unloaded from tank cars and placed in storage. The Tennessee act only provided that a person should not sell any oil before having it inspected.

It did not appear there was any discrimination against the products of other States, for it was not alleged that oil was not produced nor refined in Tennessee.

The Supreme Court considered the case solely as a taxing proposition and agreed that where the oil had been emptied from the car and had been put in storage tanks of the Tennessee corporation, such property was then at rest in that State and had become a part of the mass of the property of the State, and therefore was subject to be taxed.

The Supreme Court did not determine this case from the standpoint of inspection, but only from the standpoint of taxing. Purely as a taxing proposition it can readily be seen why it was not necessary to overrule it in the subsequent cases decided by the Supreme Court of the United States. The decision in the Crain case was not a unanimous one. While the Court might have decided the case from the inspection aspect of the law, it did not do so. Had the oil reached a state of rest in Tennessee it might have become subject to the taxing laws of Tennessee, but as we show in other parts of this brief by citation of the decisions of the Supreme Court of the United States, the oil could not be at rest in the State of Tennessee as a part of the mass of property of such State without having the essential qualification of prop-

erty, to-wit: the right of sale, and the right of sale could not exist until inspection had taken place and then only did it become a portion of the property of the State with the protection of its laws.

In the Graves case, the Court says that the distinction between the Graves case as an inspection proposition and the Crain case which was treated on a taxing basis, was obvious.

In the instant case The Texas Co. could not make its oil a part of the general mass of the State because it could not sell or offer for sale that property, nor could it hold it in storage without paying an inspection fee five times the cost of inspection, nor could citizens of Georgia import it for their own use without the payment of such inspection fee.

Therefore, how apropos is the language of this Court in *Schollenberger vs. Pennsylvania*, 171 U. S. 22, which quotes with approval the language of Mr. Chief Justice Fuller as follows:

> "They had the right to import this beer into that State and in the view which we have expressed they had the right to sell it, *by which act alone it would become mingled in the common mass of property within the State.* Up to that point of time we hold that in the absence of Congressional permission to do so the State had no power to interfere by seizure or any other action in prohibition of importation and sale by the foreign or non-resident importer."

The Supreme Court in the case of *Standard Oil Co. vs.*

Graves, 249 U. S. 397, cites with approval two decisions of the Supreme Courts of North Dakota and Ohio.

In the first case cited, *Bartels Northern Oil Co. vs. Jackman*, 150 N. W. 576, an inspection law was attacked which imposed a fee of one-half cent per gallon, on the ground of its excessiveness, it being charged with the infirmity of violating the commerce clause of the Federal Constitution. The plaintiff alleged (page 577):

> "It buys from time to time and has placed in its storage tanks at several places of business in the State of North Dakota large quantities of kerosene, etc., and from such tanks furnishes the same directly to the consumer."

The plaintiff further alleged that the inspection law interfered with the business of the plaintiff and would interfere unless the inspector were restrained and that there was no provision of law whereby the plaintiff could obtain possession of such oil which was the subject of interstate shipment, without the payment of excessive inspection fees.

The Supreme Court of North Dakota, in a decision which practically becomes a part of the decision of the Supreme Court of the United States in the Graves case (249 U. S. 389), basing its decision on *Foote vs. Maryland*, 232 U. S. 494, declares the inspection law void. The Supreme Court of North Dakota undertakes to explain the Crain case and says (150 N. W. 582):

> "The State cites and relies upon *General Oil Co. vs. Crain*, 209 U. S. 211. On first inspection the

facts in that case seem to make it an authority, but on close reading it appears that the inspection fee there held valid only related to the inspection of oils shipped into the State and afterwards commingled with the general property of the State, that is, it was shipped in, unloaded and placed at rest, perhaps to be thereafter shipped out of the State, but it was held that in view of its being placed at rest in the State, and the inspection being thereafter made, it had ceased to be an interstate commodity and that the provisions of the Federal Constitution were not applicable."

"If, however, the Crain case would otherwise be an authority, *it must be considered as superseded by the Foote case from which we have quoted,* which stands as the law applicable until overruled by the Supreme Court."

Page 582:

"The members of this Court fully appreciate the gravity of the situation occasioned by our conclusions and also that all doubt should be resolved in favor of the validity of the tax. We have carefully considered and analyzed the authorities cited by the State, claiming to sustain its position, but they furnish no justification for sustaining the tax in the light of the Federal authority to which we have made reference and which is absolutely controlling on the Federal question involved."

The next case cited by the Supreme Court of the United States in the Graves case, and practically making the decision a part of the decision of the Supreme Court is that of *Castle vs. Mason,* 110 N. E. (Ohio) 463.

In this case Castle filed a bill to enjoin an oil inspection act of the State of Ohio. The charge is that the fees were excessive and therefore in violation of the commerce clause of the Federal Constitution.

It appeared from the bill (110 N. E. 464), that before oil was offered for sale to customers it should be inspected, whether manufactured in Ohio or not.

The petition showed (page 463) that Castle was engaged in the manufacture and sale of oils and other petroleum products at Cleveland, Ohio, and that Castle was selling to retail customers in Ohio the products of refineries, which products he bought from refineries in the State of Pennsylvania and elsewhere.

The Supreme Court of Ohio says (110 N. E. 466):

> "Defendant attempts to escape the effect of *Foote vs. Maryland*, 232 U. S. 494, by a claim that the Ohio Act does not interfere with interstate commerce—that the act imposed a charge upon oils that are sold in this State only and that if products had been imported into Ohio by tank cars or otherwise they have then assumed a state of rest as intrastate commerce and may be taxed without violation of the Federal provision. This is too narrow a construction of the facts pleaded and of the scope of the Ohio act. The act is not in terms made to apply to intrastate products but applies generally to any and all oils, gasolines, etc., 'whether manufactured in this State or not.' The language employed would require inspection of products shipped into the State and the features of the inspection would necessarily, though indirectly, impose a burden upon interstate

> commerce. . . . . The fact is that Castle, at Cleveland, Ohio, was dealing directly with shipments of oil from Pennsylvania and the products he received as such purchaser must have of necessity been shipped to him in original packages which were required to be inspected before sale. . . . . We are therefore constrained to hold that the inspection act necessarily operates and imposes a burden upon commerce from other states and that insofar as the same affects such commerce it violates the Federal Constitution."

In the case of *Pure Oil Co. vs. Minnesota*, 248 U. S. 158, the Court says (pages 159-164):

> "Whether oil and gasoline imported into the State in tank cars continue to be the subjects of interstate commerce while awaiting such inspection at the owner's place of business before they were unloaded and held for general sale and distribution—not decided."

But in the same decision, page 162, the Court says:

> "But if such inspection charge should be obviously and largely in excess of the cost of inspection, the Act will be declared void because constituting in its operation an obstruction to and burden upon that commerce among the States, the exclusive regulation of which is committed to Congress by the Constitution. *Postal Tel. Cable Co. vs. Taylor*, 192 U. S. 64; *Foote vs. Maryland*, 232 U. S. 494-508."

Thus the Supreme Court recognizes that while imported property in the original package may be subject to local taxation it cannot be subjected to excessive inspection fees as a condition to its sale in the State because

such excessive inspection fee directly interferes with interstate commerce and prevents the imported property from becoming a part of the general mass of the property of the State until liability for such excessive inspection fees has been incurred.

Schollenberger vs. Pennsylvania, 171 U. S. 22.

To show how intimately the matter of sale of imported goods is connected with interstate commerce, is indicated by the case of *Sioux Remedy Co. vs. Cope*, 235 U. S. 197.

The right to demand and enforce payment for goods sold in interstate commerce is directly connected with and essential to such commerce and the imposition of unreasonable conditions on such right operates as a burden and restraint upon interstate commerce.

In that case (page 204) the statute of South Dakota imposed upon foreign corporations as a condition to sue in the Courts of the State the filing, in the office of the Secretary of State, of its charter and the appointment of a resident agent upon whom process could be served and the payment of the required fee. The Supreme Court says (page 205):

> "If one State can impose such a condition, others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassments—as applied to such rights we think the conditions are unreasonable and burdensome and therefore in conflict with the commerce clause."

The above case of Cope throws light upon the claim of defendants that they could order the emptying of tank

cars into barrels as a condition of inspection, when such emptying would be useless. As illustrative of the extent to which the commerce clause of the Constitution protects interstate commerce we cite *York Manufacturing Co. vs. Colley, et al.*, 247 U. S. 21, which reversed the Court of Civil Appeals of Texas.

In that case an interstate contract of sale for a complicated ice making plant stipulated that the parts should be shipped into the purchaser's state and the plant there assembled and tested under the supervision of an expert sent by the seller. The erection took three weeks and the test a week more. The purchasers agreed to pay the expert and furnish mechanics for his assistance. The Texas court held that the seller engaged in a local business in the State and as such permit required by the Statutes had not been secured, dismissed the plaintiff's action.

The Court held, through Mr. Chief Justice White, that the provisions

> "as to the services of the expert were germane to the transaction as an interstate contract and did not involve the doing of a local business subjecting the seller to regulations of Texas concerning foreign corporations."

As most persuasive authority we cite the recent decision rendered in the month of January, 1920, by Circuit Judge Walker and District Judges Grubb and Clayton in the case of *Wofford Oil Co. vs. Smith*, Attorney General of Alabama. That case is now before the Supreme Court of the United States on appeal and is absolutely analogous

to this case. In both cases the excessiveness of the fees were admitted. The three Judges decided the act was void as contrary to the commerce clause of the Federal Constitution, and said the following in their decision:

> "We find that the tax or charge imposed by the Legislature in the act entitled as stated in the beginning of this opinion is unduly in excess of the necessary expense incident to the enforcement of the inspection law and is for that reason an unlawful burden upon commerce between the States and that the act is void and therefore injunction must issue as prayed for, and it is so ordered."

Under this heading we have dealt with the Georgia legislation as providing for inspection and not providing an occupation tax.

> "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions and weight of package, mode of putting up and marketing and branding of various kinds. It (right of inspection) is generally said to extend to making regulations promotive of domestic order, morals, health and safety." 14 Ruling Case Law, 682-3.

How, therefore, can the Georgia law be one providing for occupation tax? It was not a tax which the Legislature levied in the oil inspection act. It was an excessive fee charged for the performance of a service required by it in an otherwise valid enactment. If these excessive fees be a tax or an excise not on property but on an occupation, or a right to sell, upon what occupation or upon what right to sell is the tax levied? Is it upon the general occupation of selling oil products? No; for these

fees are connected with the *first* sale or offer of sale of such products only and not the general business of selling said products. If it be such a tax or excise upon an occupation, what occupation? It is not the occupation of selling inspected oils. Is it a tax or excise upon the occupation of selling uninspected oils? No; for the sale of uninspected oils is prohibited by the statutes. Then upon what business or right to sell is this tax or excise levied? Can it be upon the business of having your oil products inspected? Certainly having such oil products inspected is not a business. It is not the business in which plaintiff is engaged. The inspection of its oil products is a requirement of the law of Georgia as a prerequisite to the engagement by The Texas Co. in its business, viz.: the sale of its products imported from without the State into the State of Georgia.

The lower court said the excessive fees really granted the "privilege of storage and sale after inspection." If this be true then admittedly the charge is put on nobody except the importer and is confessedly discriminatory. No charge is put upon any citizen who stores and sells after inspection.

The Texas Co. might pay the State of Georgia all the fees demanded but it would not thereby be authorized to sell its products or offer them for sale or storage. There would be still left in dispute all the purposes of the Statute.

If the fees were an excise or privilege tax and the purpose was to raise revenue, why should not everybody in

the State of Georgia selling oil be required to pay such tax?

What the Legislature does is to charge an excessive and therefore unconstitutional fee for the performance of inspection service.

The court below in reaching its conclusion that the excessive inspection fees were taxes, cites various cases which we respectfully submit are not applicable.

The license tax cases in 5 Wallace, 462, were cited. There the Government passed an act "to provide internal revenue to support the Government" and the Supreme Court construed the legislation from that standpoint and adverted to the fact (page 473) that Congress had substituted the words "special tax" for the word "license."

In *Royall vs. Virginia*, 116 U. S. 572, it was held that the "special revenue license" required by the Courts of Virginia of attorneys at law as a condition to practice their profession is a tax laid for revenue. The Supreme Court said (pages 579-80):

> "It is an occupation tax for which the license is merely a receipt and not the authority, except in that sense because it is laid and collected as revenue and not merely as incident to the general police power of the State, which under certain circumstances and conditions regulate certain employments with a view to the public health, comfort and convenience. In the latter class of cases the exactions may be either fees or fines as they are proportionate to the expense of regulation or laid as a burden upon and discouragement to the business and not because

> they are levid for the purpose of raising public revenue by means of the contribution either from the person or the property or the occupation of all citizens in like circumstances."

It seems that this decision is rather adverse to the opinion of the Court below.

The case of *Gundling vs. Chicago*, 177 U. S. 183, is cited. In that case an ordinance of the City of Chicago authorizing the issuance of a license to persons to sell cigarettes upon payment of $100, was sustained. The act was plainly a revenue act and in the course of the decision (page 186) the Supreme Court cites the case of *Yick Wo vs. Hopkins*, 118 U. S. 356, which held an ordinance of the City of California void because it conferred upon municipal authorities arbitrary power to withhold consent for carrying on a laundry and held it was clearly an intentional discrimination against the Chinese.

In the Gundling case the ordinance of Chicago intended for the raising of revenue did contain an incidental provision that the application for the license should show that the person or corporation was of good character and reputation.

Such provisions were quite frequent as an essential for the granting of a license to dealers in intoxicating liquors where the license fee was manifestly imposed for revenue and incidentally the State only allowed the conduct of such business by men of good repute. We respectfully submit that this case has no reference to the instant case involving inspection fees.

VOID AS AN OCCUPATION, LICENSE OR EXCISE TAX

Viewed as an occupation, license or excise tax the law is unconstitutional and violative of the commerce clause of the Federal Constitution and the Fourteenth Amendment.

As a tax the excessive inspection fees constitute an arbitrary and discriminatory burden on interstate commerce.

The tax is levied only on the first or original sale of these products and it is admitted in the pleadings that no oil is produced in the State of Georgia. The right of sale as a part of interstate commerce has been demonstrated by the decision previously cited.

The tax viewed as an excise or privilege tax is directly one against the sale of products of other states because all of such products must come from other states.

Judge Seymour, in *American Fertilizer Co. vs. Board of Agriculture*, 43 Fed. 609, used apposite language, as follows:

> "It may be remarked that if the power were given to a state to tax all imports from other states without control, provided equal taxation were laid upon the same articles of its produce or made in that state, the states would practically have the power to prohibit the introduction of any article not made in the state. North Carolina might tax the importation of manufactured clothes and Massachusetts that of cotton or tobacco. If this tax can be sustained it is certain that a license tax in these words would be con-

stitutional: 'no manufactured cotton shall be sold or offered for sale in this state until the manufacturer or person importing the same shall first obtain a license therefor and pay a tax of $500.00.' The same tax upon different brands of tobacco might be levied in another state that does not manufacture tobacco. It must be evident that the requirement of equality of taxation on the imported and home article would be no protection against such taxation as would seriously check if not destroy commerce between the States.

"A burden imposed by a State on interstate commerce is not to be sustained simply because the statute imposes or applies alike to all the people of all the states, including the people of the state enacting such statute." *Minnesota vs. Barber*, 136 U. S. 289-327.

Neither is the tax rendered valid by the fact that it applies to internal as well as external commerce.

Crew Levick & Co. vs. Pennsylvania, 245 U. S. 292;
Minnesota vs. Barber, 136 U. S. 313;
Brimmer vs. Rebman, 138 U. S. 78;
Robbins vs. Shelby Taxing Dist., 120 U. S. 489-97;
Case of State Freight Tax, 15 Wall. 232-277.

Discriminatory taxes against articles from other States are void.

"It matters not whether a tax be levied directly upon the article sold or in the form of license after they are sold." *Webber vs. Virginia*, 103 U. S. 344.

Circuit Judge Walker, in his dissenting opinion in the instant case, says:

"To sustain the statute to the extent indicated in the foregoing opinion (the majority opinion) requires the affirmance of the provision that as to imported goods which, with intent to use or sell them, have been removed from the original containers in which they were brought into the State, a charge for inspection grossly in excess of the expense involved may be exacted as the price of such goods becoming the subject of lawful use or disposition in the State. . . . . If such an obstacle may be put in the way of imported commodities acquiring the beneficial qualities of property, the prohibition of interference with interstate or foreign commerce may easily be defeated. If such an exaction is not subject to the limitations imposed on inspection charges, then all imported commodities, whether the proper subject of inspection or not, may be subjected to such exactions as the State may choose to impose as conditions precedent to their acquiring the capacity of being lawfully dealt in. . . . . If a State can require the payment of such fees as those in question it also may exact similar payments for shoes, hats, calico, nails, horse-collars, or any kind of commodity that can be used or sold. It is not believed that such an exaction can be regarded as a property, occupation or privilege tax. No property, occupation or privilege is taxed. If on the ground that it is possible for a commodity to have its origin in a State, it may be subjected to such charges for inspection, there is an easy way of creating an obstacle to any imported commodity entering into the commerce of the State. . . . . A denial of the State's right to make such exaction does not amount to the denial of its taxing power or of its police power of making reasonable regulations for the protection of its people."

It should be noted that as a statute taxing the first sale of any commodity in Georgia, this act stands alone. There is nothing in the laws of Georgia similarly taxing the first sales of other products. The Court said in *Brimmer vs. Rebman,* 138 U. S. 78, a decision quoted both in the Graves case and by Judges Walker, Grubb and Clayton in the case of *Wofford Oil Co. vs. Smith,* Attorney General of Alabama, that

> "The State may not, under the guise of exerting its police powers or of enacting inspection laws, make discriminations against products and industries of some of the states in favor of the products and industries of its own or other states."

As stated by Mr. Chief Justice Fuller in *Leisy vs. Hardin,* 135 U. S. 100, the power could not be conceded to the States:

> "To exclude, directly or indirectly, the business of interstate commerce or by the imposition of burdens thereon to regulate such commerce without Congressional permission. The same rule applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland, or the products, natural or manufactured, or any other State and applies to all commodities in which the right of traffic exists as recognized by the laws of Congress, the decisions of the courts and the usages of the commercial world."
>
> *Lyng vs. Michigan,* 135 U. S. 161-66.

In *Welton vs. Missouri,* 91 U. S. 275, a license tax on peddlers dealing in merchandise not the growth, produce or manufacture of the State, was upheld by the State

Court, but the Supreme Court of the United States, on the authority of *Brown vs. Maryland*, through Mr. Justice Field, held (page 278):

> "The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State."

Mr. Justice Field said (page 280):

> "Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all of its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of different states."

Page 282:

> "The main object of that commerce is the sale and exchange of commodities."

The law of Georgia prevents The Texas Co. from holding its oil for sale or consumption until after the illegal inspection fees are paid, and the clear intent of the law is shown by the amendment to the act of the General Assembly of 1913, pages 110-111, where it is provided that the inspection act shall apply

> "Not only to gasoline, benzine and naptha sold or offered for sale in the State of Georgia, but likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia for consumption or use."

When consignment is made direct to the customer for

his own use the oil cannot by any conceivable construction said to be at any time in intrastate commerce.

In *Walling vs. Michigan*, 116 U. S. 446, a tax was imposed upon persons not residing or having their principal place of business within the State, who engaged in the sale of intoxicating liquors. The Statute was held unconstitutional and the court said (page 460):

> "None of these cases, however, sustain the doctrine that an occupation can be taxed if the tax is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another State or against the citizens of another State."

In *Schollenberger vs. Pennsylvania*, 171 U. S. 1, the Court examined the historical development of the principle that the right of sale is a necessary incident to the right of interstate commerce. The Court held that the commerce clause of the Constitution must be capable of authorizing the sale of those articles which it permits to be introducted.

The Court then pointed out that *Leisy vs. Hardin*, 135 U. S. 100, "went a step farther." There it was held that an importer had a right to sell in a state that which he brought into it.

> "They had the right to import this beer into that State and in the view which we have expressed *they had the right to sell it, by which act alone it would become commingled in the common mass of property in the State.* Up to that point of time we hold that in the absence of Congressional permission

> to do so, the State had no power to interfere by seizure or any other action in prohibition of importation and sale by the foreign or non-resident importers."

Proceeding further, the Court says:

> "We do not say or intimate that this right of sale extends beyond the first sale by the importer after its arrival within the State. (*Waring vs. Mayor*, 8 Wallace 110-122.) The importer had the right to sell, not only personally, but had the right to employ an agent to sell for him, otherwise, his right to sell would be substantially valueless."

So it will be observed in the instant case that if oil cannot be sold, business cannot be done, and in Georgia The Texas Co. cannot sell nor offer for sale, nor hold in storage in its original tank cars the oil without having the excessive inspection fee paid, and the language is so broad in other features of the act as to cover (Section 1809) (Rec. 7) The Texas Co. if it has in its possession or sells or gives away oil, etc., which it has brought into the State of Georgia.

In the case of *Welton vs. Missouri*, 91 U. S. 282, the Court says the commercial power of the Federal Government

> "continues until the commodity has ceased to be the subject of discriminatory legislation by reason of its foreign character. That power protects it even after it has entered the State from any burdens imposed by reason of its foreign origin."

The original package doctrine is but one of many tests in regard to the power of the State to deal with articles

imported from foreign countries or other states. The article may be in the original package and be subject to state taxation.

Brown vs, Houston, 114 U. S. 622.

We understand that if goods be imported in the original package and commingled by the merchant with his other goods for the purpose of sale it might become subject to taxation.

An article may have left its original package and not be subject to State taxation.

Walling vs. Michigan, 116 U. S. 446.

Thus any tax upon the sale of an article by reason of its foreign growth or manufacture will be invalid, although the sale were made in a broken package. On the other hand, the sale of an article which has come to a point of rest within the State and which is there held for the convenience and business purposes of the importer, may be subject to general taxation.

In this case the complaint is that the oil of The Texas Co. may not be sold at all without the payment of excessive inspection fees.

> "Commerce among the States is not a technical legal conception but a practical one, drawn from the course of business." *Swift & Co. vs. U. S.,* 196 U. S. 375. Quoted in *Savage vs. Jones,* 225 U. S. 501-520.

Taxation of original sales of oils brought into Georgia burdens interstate commerce in such oils.

The Texas Co. is entitled to invoke the protection of the Constitution, whether the tax falls on sales made by The Texas Co. or by its customers importing such oils; the burden on interstate commerce is the same.

Savage vs. Jones, 225 U. S. 501-520.

State taxation burdens interstate commerce when it measures the tax by the volume of interstate business or by the gross returns thereof.

The distinction between taxes as direct or indirect burdens on interstate commerce is nowhere better shown than in the decision of the Court in *U. S. Glue Co. vs. Oak Creek*, 247 U. S. 328:

> "It is well settled that a State may not directly burden interstate commerce either by taxation or otherwise, but a tax that only indirectly affects the profits or returns from such commerce is not within the rule."

This case cites *Postal Telegraph Cable Co. vs. Adams*, 155 U. S. 688, where it was held that the right of a foreign corporation to engage in business will be taxed according to the value of its property within the State, "if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to ordinary means devised for the collection of taxes."

Mr. Justice Pitney pointed out the correct line of distinction in two recent decisions of the Supreme Court.

In *Crew Levick Co. vs. Pennsylvania*, 245 U. S. 292, it was shown

> "that the State tax upon the business of selling goods in interstate commerce measured by a percentage of the gross transactions in such commerce was necessarily a tax on such commerce since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received."

In *Peck & Co. vs. Lowe*, 247 U. S. 165, the Court decided that a net income tax was not such a direct burden.

In the instant law of Georgia it will be observed that viewed as a tax, every gallon in the 8,000-gallon tank cars must pay the tax, while it takes no longer time to inspect 8,000 gallons than a 50-gallon barrel, and this tax must be paid before the oil can be sold, held for sale or storage. This tax falls on each gallon of oil imported into the State of Georgia.

The difference between the power of the State to tax goods (prohibited only in cases where goods are imported from a foreign country and still retain their character as such) and the authority of the State to interfere with the introduction and disposal of goods in interstate commerce is clearly drawn by the Chief Justice in the case of *American Steel & Wire Co. vs. Speed*, 192 U. S. 522, in considering the decision in *Leisy vs. Hardin*, 135 U. S. 100.

> "Interstate commerce was completely terminated only after the sale at the point of destination in the original package."

The case of the *American Steel & Wire Co. vs. Speed*, 192 U. S. 500, established the principle that the right of

a State to tax goods which are the subject of interstate commerce does not depend upon the question of whether interstate commerce in the articles involved has completely terminated and that therefore the State may legitimately exercise its taxing power with respect of goods which are still in certain aspects the subject of interstate commerce, but the State is devoid of power to impose prohibitive or discriminatory conditions upon the disposition of those same goods or to restrict in any manner the completion of commercial intercourse in them.

This case is cited in the majority opinion of the Court below as support for its decision. We have no quarrel with that case. There goods were brought in original packages from another State into Pennsylvania, arrived at their destination and were at rest within the State and were enjoying the protection which the laws of that State offered and were there for the convenience and business of the owner. The tax was levied upon everybody alike and no discrimination was practiced against the American Steel & Wire Co. In the instant case the tax was levied only against the importer and necessarily discriminated against interstate commerce and did not apply alike to everybody dealing in oil in the State of Georgia, and in addition the oil never became a part of the mass of the property of the State and subject to the protection of its laws. The oil did not possess the qualities of property in that it could not be sold until the excessive inspection fees were paid, and therefore it did not become "at rest."

The Court below cites *Bacon vs. Illinois*, 227 U. S. 504. In that case the Court said (page 505):

> "Property brought from another State and withdrawn from the carrier and held by the consignee with full power of disposition becomes subject to the local taxing power, notwithstanding the owner may intend to ultimately forward it to a destination beyond the State. Goods within a State may be made the subject of a non-discriminatory tax though brought from another State and held by the consignee in the original package."

In the Georgia case the goods were the subject of a discriminatory tax and were not held by the consignee with full power of disposition because the excessive inspection fees had to be paid prior to the disposition of the oil.

If the shipment of oil into Georgia and its sale in Georgia constitutes interstate commerce and if both the shipment and the sale are integral essential acts of interstate commerce, then clearly this statute which taxes the second of those acts, the sale and consummation of the interstate transaction, is an improper burden on interstate commerce.

To tax the right of sale is to tax one of the finishing attributes of interstate commerce and the power to tax the sale of an article in consummation of its interstate commerce shipment is very different from the power to tax that article together with all other property in the State upon which the burden of a valid law might equally fall.

Indeed it seems that no acts necessary to the completion of interstate commerce in the article can be taxed

as such. This is decided very pointedly by the Chief Justice in *York Mfg. Co. vs. Colley*, 247 U. S. 21.

The defendants contend that the inspection acts of Georgia do not prohibit the importation of oil, but only its sale. The Court in the Graves case cites *Brimmer vs. Rebmann*, 138 U. S. 78, in which it held that a statute to prohibit from sale certain meats was void because, viewed as a police measure, the inspection act in that case was unreasonable and discriminatory.

Any State law which prohibits or tends to prohibit interstate commerce is void as laying a burden upon such commerce unless it comes within the power of taxation or the police power of the State, and in either of these cases such burden is still unconstitutional unless the power be exercised reasonably and without discrimination and not as a cloak for an excessive fee.

The Court below seemed to think it found support for its position in maintaining the excessive inspection fees as a tax from the case of *Askren vs. Continental Oil Co., et al.*, decided April 19th, 1920, and reported 40 Sup. Ct. Rep. 355.

To our minds this case is entirely irrelevant to the subject. In the Askren case there was involved no inspection fee at all. The New Mexico law imposed an excise tax on every dealer in gasoline. Every citizen in the State of New Mexico engaged in the business had to pay the fee, which manifestly was for the purpose of revenue. There was no element of discrimination. There

was no exercise of the police power in determining quality and character of the gasoline, and inspectors were provided (page 355) in each of the eight judicial districts of the State who were required to see that the sellers paid their license fees.

In the Askren case the tax is on the privilege of dealing in gasoline in the State of New Mexico and there is no contention that the taxes are grossly excessive. Hence, since the nondiscriminatory tax on the privilege of selling gasoline was valid, but the tax on sales in the original package was invalid, the relative importance of taxable sales was material.

In the Askren case the Supreme Court says (U. S. Sup. Ct. Opinions, 1919-1920, No. 133, p. 455):

> "Much is made of the fact that New Mexico does not produce gasoline and all of it that is dealt in within that State must be brought in from other States, but so long as there is no discrimination against the products of another State and none is shown from the mere fact that the gasoline is produced in another State, the gasoline thus stored and dealt in is not beyond the taxing power of the State."

In the Askren case the payment of the tax was not a condition precedent to the sale of the product upon payment of which alone the gasoline could become at rest in the State.

In the case of *Pure Oil Co. vs. Minnesota*, 248 U. S. 158, the oils were unloaded and held for general sale and distribution. Sales made otherwise than in original con-

tainers were therefore covered in that case. The same is true of the case of *Standard Oil Company vs. Graves*, 249 U. S. 389.

The Askren case, instead of modifying the decision in the Graves case, expressly reaffirms and approves it, and refers to it as simply reaffirming "what had often been adjudicated heretofore in this court," namely, that a privilege tax providing for a levy of fees in excess of cost of inspection amounted to a direct burden on commerce. These decisions have held that such taxes were void as a whole.

Circuit Judge Walker, in his dissenting opinion in the court below in the instant case, said in regard to the Askren case as follows:

> "The statute is materially different from the one which was passed on in the case of *Askren, et al. vs. Continental Oil Co.*, U. S. Supreme Court, April 19th, 1920. The statute there in question was held to impose a tax upon the privilege of dealing in gasoline in the State of New Mexico. It did not require any inspection of gasoline. It imposed a tax on the privilege of dealing in that commodity. . . . . The statute now in question exacts the payment of fees for inspecting oil and does not tax oil as property in Georgia or the privilege of dealing in it there."

The great danger that is guarded against by the commerce clause of the Federal Constitution is the inclination of the States to impose greater taxes on foreigners than its own citizens, and when a like burden is imposed on everybody the importer may do business under a reason-

able guarantee against oppressive burdens. It may be safely assumed that the State of Georgia would not place on its own citizens under the guise of inspection fees charges that amounted to five times the cost of inspection.

VIOLATIVE OF FOURTEENTH AMENDMENT

On its face the imposition of inspection fees amounting to five times the cost of inspection is arbitrary and unfair. If a city provided two policemen to guard a powder magazine at a cost of $200.00 per month, it would be unjust to charge the Powder Company $1,000.00 per month for such service.

The inspection fees under the guise of taxation violate the Fourteenth Amendment to the Constitution. They are not only arbitrary but are without regard to any real basis of classification.

It takes the same length of time to inspect 50 gallons as 8,000 gallons of oil and yet the tax is in proportion to the amount. It is a tax only upon the first sale. It is an arbitrary assessment.

Southern Ry. vs. Green, 216 U. S. 400.

When the court perceives that such fee is necessarily levied on interstate commerce and solely on the importer, it becomes especially obnoxious.

Raymond vs. Chicago Traction Co., 207 U. S. 20;
Connolly vs. Union Sewer Pipe Co., 184 U. S. 540.

Every vendor of volatile products of petroleum is the vendor of a similar substance, but by this law only the first vendor is taxed for selling it. The law carefully excludes the citizens of Georgia from the payment of these excessive fees, although engaged in the same business.

Arbitrary selection cannot be justified even if the Legislature attempts to call it a basis of classification.

The United States Supreme Court dealt with this subject of classification in the case of *F. S. Royster Guano Co. vs. Commonwealth of Virginia*, 40 Sup. Ct. Rep. 560.

In that case the court held:

> "Acts of Virginia, 1916, C-472, insofar as it imposes on a domestic corporation doing business both within and outside the State a tax with respect to its income derived from sources outside the State, denies such corporation the equal protection of the laws in violation of the Fourteenth Amendment, in view of Acts of Virginia, 1916, C-495, exempting domestic corporations doing no part of their business within the State, from any tax on their income, the classification being arbitrary."

In the instant case it practically is admitted by the opinion of the lower court that viewed as inspection fees the excessive charges cannot be sustained and it attempts to sustain the charges from the viewpoint of taxes. Therefore, viewed as a tax, what legal basis for classification can be made by charging a tax only against the first seller of the imported article?

As denouncing arbitrary selection, we cite the following cases:

Gulf, Colorado & Sante Fe Ry. vs. Ellis, 165 U. S. 150;
Cotting vs. Kansas City Stockyards, 183 U. S. 79;
Connolly vs. Union Sewer Pipe Co., 184 U. S. 540.

The Federal Court is not bound to accept the construction placed upon a statute by a State court when that construction impairs rights guaranteed under the Federal Constitution, and this is clearly true of the provisions of the Fourteenth Amendment.

Galveston H. & S. Co. vs. Texas, 210 U. S. 217-27;
St. Louis Sou. Ry. Co. vs. Arkansas, 235 U. S. 350;
Kansas vs. Botkin, 240 U. S. 227.

As was said by the court in the case of *St. Louis Sou. Ry. vs. Arkansas*, 235 U. S. 350:

> "When the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State court."

VIOLATIVE OF STATE CONSTITUTION

We maintain the oil inspection legislation of Georgia is void under the Constitution of the State. Viewed from the standpoint of the State Constitution as quoted by Judges Walker, Grubb and Clayton in the Wofford case,

from *L. & N. Ry. vs. Garrett*, 231 U. S. 301, which was an appeal from an order denying a motion for an interlocutory injunction and heard before three judges, the Supreme Court of the United States said:

> "Because of the Federal questions raised by the bill the Circuit Court has jurisdiction and was authorized to determine all questions in the case, local as well as Federal."

The Constitution of Georgia, Article 7, Section 2, Paragraph 1, provides:

> "All taxation shall be uniform upon the same class of subjects and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax and shall be levied and collected under general laws."

If the excessive inspection laws of Georgia are regarded as a tax they are not uniform upon the sale of oil because they do not operate upon all oil sold, but without regard to reasonable classification, only operate upon the first sale.

The Supreme Court of Georgia, *Beckett vs. Mayor and Aldermen of Savannah*, 118 Georgia 58, held:

> "While an attorney at law who engages in the business of lending money is subject to a lawful municipal tax imposed upon all money lenders, an ordinance which seeks to tax attorneys at law who lend money, without taxing other money lenders, is violative of that provision of the Constitution which

requires that 'all taxation shall be uniform upon the same class of subjects.' "

Page 59:

"That the requirements of our Constitution as to uniformity of taxation upon the same class of subjects refers to such a tax as this, see *Mayor of Savannah vs. Weed,* 84 Ga. 683-685."

Page 60:

"Such a tax cannot be imposed upon certain particular persons engaged in a business without taxing others engaged in the same business. An attorney at law cannot be required to pay a tax for lending money and to take out a license as a prerequisite to engaging in that business when no similar burdens are imposed on money lenders who happen not to be attorneys at law. Such a classification of those who advance money to lend or engage in the business of lending money is not natural but arbitrary and unreasonable and cannot be upheld. The ordinance under which plaintiff in error was convicted was clearly directed at those money lenders who were also attorneys at law and did not embrace other lenders of money. The ordinance was unconstitutional and void."

Mayor and Aldermen of Savannah vs. Weed, et al., 84 Ga. 683.

"The Legislature or municipal authorities may classify all subjects of taxation exclusive of property and may tax or exempt any or all of such classes with a uniform rate upon the whole of each class taxed. Taxation upon property must be upon all not

exempted in the Constitution, with a uniform rate upon all kinds."

Page 685:

"Property is not the only subject of taxation. Everything to which the legislative power extends may be the subject of taxation, whether it be personal property or possession franchises or privilege or occupation or right." Cooley on Taxation, page 5.

"We think this clause refers to subjects of taxation other than property and means that if one kind of business, privilege, franchise, right, etc., is taxed the tax shall be uniform upon all of that class. For instance, if liquor dealers are taxed, the tax as to liquor dealers shall be uniform; if draymen are taxed for carrying on their business the tax shall be uniform as to all of that class; if butchers, lawyers, physicians, dentists and photographers are taxed, the tax need not be the same upon all of these but shall be uniform as to each one of these classes. Upon this subject see:

Cutliff vs. Mayor, et al., 60 Ga. 597;
Shepperd vs. Commissioners, 59 Ga. 535;
Davis vs. Mayor, 64 Ga. 128."

"The Legislature or municipal authorities are not bound to tax any occupation or business within their territorial limits, but when they undertake to tax one class of business or occupation the same tax must be levied on all members of that class." *Davis vs. Mayor*, 64 Ga. 128.

Wright, Comptroller General, vs. Southern Bell Tel. & Tel. Co., 127 Ga. 227. "The provision in a

tax act that persons engaged in a given business, if the revenues derived from their *ad valorem tax* together with all taxes on franchises of such persons do not amount to 2½% of the gross receipts of such persons from such business, shall pay as an occupation tax such a per centum upon its gross receipts as will, when added to the *ad valorem taxes*, State and county, including all taxes on franchises, be equal to 2½ per centum on the gross receipts, is lacking in uniformity and invalid."

(Page 229) "While the General Assembly has no power to classify property for taxation, it is authorized to classify occupations, but when the classification is made the tax levied must be uniform upon each member of that class. . . . . In the opinion in the last case cited there is a dictum to the effect that if the right to classify at all is conceded, an arbitrary classification would not violate the rule that all taxation should be uniform. The classification in that case was held however, to be neither arbitrary nor unreasonable. The better view seems to be that a classification must be reasonable and natural."

(Page 230) "But when an occupation tax of this character is levied, uniformity is still required and every member of the class having the gross earnings subject to taxation must pay the same rate on its gross receipts. . . . . When one company or person is allowed a deduction of one amount and another of still another amount, the amount of deduction not being fixed by any uniform rule but by merely ascertaining the amount of tax paid by such company or person on the property that it might own, the scheme is entirely lacking in that uniformity which the Constitution requires."

In the case of *Bartels Northern Co. vs. Jackman,* State Inspector of Oils, 150 N. W. 576, cited by the Supreme Court of the United States in the Graves case, the Supreme Court says:

> "If on proof the allegations of the complaint in the case at bar with reference to the excessiveness of the fee charged for inspecting oil and gasoline are found correct, such fee is a tax on property not according to its true value in money and to the extent that it exacts the cost of inspection is a revenue measure and in conflict with Section 176 of the Constitution, which provides that laws shall be passed taxing by uniform rules all property according to its true value in money."

RELIEF PRAYED

It is observable from the pleadings in this case and the undisputed evidence that after the grant of the temporary restraining order by Judge Sibley, the inspectors of the State, in violation of their duty (Section 1807 Georgia Code) (Rec. 6), refused to inspect the oil and gasoline of The Texas Co.

Necessarily, therefore, it could not sell its interstate product, and anybody selling it would have been subjected to the pains and penalties of the Georgia statute.

Surely the defendants in such a case cannot deprive a litigant of his rights under the Federal Constitution by any method of evasion. If so, the power of the courts to

protect interstate commerce may be defeated with impunity and their orders disregarded.

In order to continue business it was necessary for the plaintiff to agree to pay the full fee to the inspectors, agreeing that the inspectors should appropriate to their own use the fees allowed them by law and letting the balance be held to await judgment of the court.

If the law is invalid The Texas Co. has lost forever the amount of the fees paid to the inspectors.

We are therefore asking that should the Georgia legislation be declared void, that the relief granted to the plaintiff shall be coextensive with its rights so that The Texas Co. may receive the protection granted to it by the Constitution of the United States and of the State.

The Court below held that the constitutional and unconstitutional parts of the Georgia legislation were separable. We are unable to see the difference between the case of *Foote vs. Maryland*, 232 U. S. 494, *Pure Oil Co. vs. Minn.* 248 U. S. 158, and the instant case, in regard to separability. In the Foote case the Supreme Court held (page 502):

> "Plaintiffs were engaged in the business of packing oysters in the City of Baltimore, of which 494,000 bushels were taken from the waters of the State of Maryland, 228,000 from the waters of Virginia and 14,118 from the State of New Jersey."
>
> (Page 508) "The excess collected may have been valid as a tax on property in Maryland but was a burden on interstate commerce when levied on oys-

ters coming from other states. This, however, renders the whole tax void because there is no claim that the intrastate commerce can be separated from the interstate shipments or that the Legislature would have taxed one and left the other untaxed."

In the instant case the paramount purpose of the Legislature was necessarily the protection of persons and property through the inspection of oils. The intention of the Legislature was manifested by providing in the Acts of 1913 (Rec. 20) that oil imported by a citizen for his own use should be inspected. In order to insure that all petroleum products should be inspected the law was coextensive with the subject matter and no oil was to be allowed in the State without inspection.

Therefore, how can it be maintained that the Legislature would have passed any act at all on the subject of inspection if some oil was to be allowed in the State without inspection?

It would seem that the separability in the case of *Foote vs. Maryland,* 232 U. S. 494, could have been much more easily sustained than in the instant case because the law itself in the Foote case provided for the disclosure of the quantities coming from the State of Maryland and from other states, and yet the Supreme Court held that the act of Maryland as an entirety was void.

The Georgia legislation is to be construed as it stood at the time of the trial in the lower court and its construction cannot be affected by any subsequent legislation which might endeavor to continue the imposition of ex-

cessive inspection fees by coming "within the law," as expressed by the lower court.

The court below cites the case of *Ratterman vs. Western Union Telegraph Co.*, 127 U. S. 411, as authority for the separability of the acts partly constitutional and partly unconstitutional. In this case a tax was imposed upon the receipts of a telegraph company derived partly from interstate and partly from intrastate commerce. To distinguish that case from the instant case it is only necessary to say that in the Ratterman case the paramount and predominant purpose was to obtain revenue, while in the instant case the predominant motive was to protect persons and property, and therefore it cannot be supposed the State would permit large quantities of oil to come into the State without inspection while imposing excessive inspection fees on other oils that might be imported.

The same distinction will be apparent in the case cited in the court below of *Singer Sewing Machine Co. vs. Bricker, Atty. General*, 233 U. S. 304. It is pertinent to cite from this case the following (page 313):

> "The statute under consideration does not in direct terms or by necessary inference manifest an intent to regulate or burden interstate commerce. Full and fair effect can be given to its provisions and an unconstitutional meaning can be avoided by indulging in the natural presumption that the Legislature was intending to tax only that which it constitutionally might tax."

A reading of the Georgia statute with its broad provisions and heavy penalties forbids the indulgence of such a presumption.

SUMMARY

Therefore, it is respectfully submitted, under the authorities cited, that the inspection laws of Georgia are void.

They cannot be sustained as a taxing statute under the Constitution of Georgia, and as an occupation tax it is an unconstitutional burden on interstate commerce since it taxes only the first or original sale and therefore discriminates against the importer, and because it is directed against the original sale of articles not produced in Georgia, and because, viewed as a privilege or excise tax it is a tax on interstate commerce and similar to a gross receipt tax on interstate commerce, and it is not sustainable either under the Federal or State Constitutions because arbitrary and without regard to any real basis for classification and taxes only the original sales of specific articles.

The situation will not commend itself to the court. The legislation endeavors to relieve the citizens of Georgia from burdens which are imposed on others doing business with those citizens. The Legislature passes acts stating in them expressly that the purpose is to protect life and property, and imposes inspection fees deemed sufficient to cover the cost of inspection, and when it is demonstrated that the inspection fees are from five to six times the cost of inspection, endeavors to appropriate the excess and by judicial construction sustain such excessive charges as an occupation tax to be imposed solely on the foreigner.

The court below declared that the Act of 1913 was not involved in this suit and we think it committed error in so holding for the reason that that act (Acts of 1913, pages 110-111) (Rec. 20) amended prior acts on the subject of oil inspection and expressed the legislative intent by providing that where oil, gasolines, etc.,

> "are purchased from within or without the State and brought into the State, not for the purpose of offering for sale but for the purpose of use or consumption by the purchaser, the inspection shall be made and the fees above fixed shall be paid."

This act in terms amends the prior legislation and constitutes part of the integer of the legislation on the subject. Therefore it cannot be held that the inspection fees imposed are a privilege tax because it would be impossible to make the personal use of the product a business and such construction would be strained and illogical.

In addition this Act of 1913, page 111, after prescribing for inspection of oils and payment of fees for such inspection by the consumer, further says:

> "No such purchaser shall be required to pay more than $1200.00 per year for the inspection of all such commodities used or consumed by him as aforesaid."

If this act were an occupation tax, necessarily and unavoidably it would be violative of the Georgia Constitution providing for uniformity of taxation on the same class of subjects for the reason that one consumer would pay $1200.00 occupation tax for the use of a certain quantity of oil while another consumer would use in-

finitely more oil without paying any more, and the importer would have to pay many times $1200.00 per year under the same occupation tax which limits the local purchaser to the payment of $1200.00.

Wright, Comptroller General, vs. Sou. Bell Telephone & Tel. Co., 127 Ga. 227.

Johnston, et al., vs. The Mayor and Council of the City of Macon, 62 Ga. 645. "When a tax on the business of merchandise is measured by the amount of goods sold by the merchant, that is by the gross value of his sales, the principle of uniformity applicable to all subjects of taxation by the Constitution of 1877 demands that the tax should be *ad valorem*, and therefore the ordinance of the City of Macon which requires each dealer in general merchandise whose sales shall exceed $200,000 to pay a business tax of $300, and each dealer whose sales are between $100,000 and $200,000 to pay $200, and each dealer whose sales range from $75,000 to $100,000 to pay $150, etc., is not uniform tax in the true intent and meaning of the Constitution of 1877, because a dealer who sold $199,000 worth of goods would pay but $200 tax while his neighbor selling but $1,000 more would pay $300.00. Each should pay in proportion to the goods sold, if the dealers be classified not as wholesale and retail dealers or by some other classification as distinct as that having reference alone to the character of business but as dealers whose *quantum* of sales is the guide to classification. Wherever values directly or indirectly are taxed, the spirit of the Constitution of 1877 requires the levy to be *ad valorem* and this, too, is the spirit of exact justice."

Especially does the Constitution of Georgia bear this

construction when in the case of *Kehrer vs. Stewart*, 117 Ga. 969, the Supreme Court of Georgia holds:

> "a tax on the privilege of selling goods is in effect a tax on the goods themselves."

Therefore, it is apparent that the Legislature never intended the inspection fees to be a privilege or occupation tax because such taxes must be uniform and under the fair interpretation and meaning of these acts the inspection for the purpose of protecting life and property is the only thought.

This is emphasized by the fact that in Georgia under the Constitution the taxes are divided into *ad valorem* and occupation taxes. By reference to the Acts of 1918, pages 43 to 83, purporting to embody all the occupation, privilege and license taxes imposed by the State, it will be observed that the inspection fees involved in the inspection of oil, etc., are not included. Such an omission occurs in all the tax acts of the State embodying the imposition of general occupational or privilege taxes and specifying the subjects of such privilege or occupation taxes.

The only resemblance which the law providing for inspection of oils in Georgia bears to a privilege tax is that inspection is required as a condition preliminary to the sale of the oil. It is like the examination of an applicant for admission to the bar to determine his qualification, or of a physician preliminary to the grant of permission to practice his profession.

The Supreme Court of the United States said in the case of *Askren, Atty. General of New Mexico, vs. Continental Oil Co., et al.*, 40 Sup. Ct. Rep. 356:

"That the tax in the case of *Standard Oil Co. vs. Graves*, 249 U. S. 289,

> "was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection and amounted to a direct burden on interstate commerce."

We understand the use of the words "privilege tax" in the Askren case as being generic rather than specific, and that the payment of the excessive fees accompanied by inspection was a preliminary essential to the right of sale of the oil. The court did not hold that the excessive inspection fees constituted a privilege tax in the sense of occupation taxes.

For the reasons given we ask this Court to hold the Georgia legislation void and to grant relief in accordance with the prayers of plaintiff's bill.

Respectfully submitted,

JAMES L. NESBITT,
of New York City,
LUTHER Z. ROSSER,
JOHN M. SLATON,
BENJ. Z. PHILLIPS,
STILES HOPKINS,
of Atlanta, Ga.,
Attorneys for Plaintiff in Error.

(Appendix follows.)

APPENDIX.

Code of Georgia, 1910 (Civil).

Section 1800. APPOINTMENT OF INSPECTORS. It shall be the duty of the commissioner of agriculture of this State to appoint an inspector of oils at Atlanta, Savannah, Augusta, Macon, Columbus, Rome, Newnan, Brunswick, Americus, and Athens.

Sec. 1801. TERMS OF OFFICE AND CLERKS. Each of said inspectors of oils shall hold his office for two years from the date of his appointment, unless sooner removed by the commissioner of agriculture for incompetence, malfeasance, or other sufficient cause. If any vacancy shall occur in any of the offices of inspectors of oils, the vacancy shall be filled by the commissioner of agriculture for the unexpired term. The said inspectors shall be authorized to appoint such clerks or deputies, with consent and approval of the commissioner of agriculture, as they may find requisite to the perfect carrying out of the laws of this State in reference to the inspection of oils, but each inspector shall be responsible for the perfect and proper performance of all the duties of his office, and shall pay his clerk or deputy out of the compensation provided for himself.

Sec. 1802. BOARD OF INSPECTORS. Each of said ten inspectors of oil, immediately after his appointment and before entering upon his duty as inspector, shall give bond in an amount to be fixed by the commissioner of

agriculture. Said bond shall be conditioned for the faithful and prompt accounting with the treasurer of the State for all moneys received by him and his deputies as fees for inspecting illuminating oils and other fluids, that shall be paid into the treasury. This bond shall be made payable to the Governor and shall be signed by the said inspector and sureties, and approved by the commissioner of agriculture.

Sec. 1803. COMPENSATION. All inspectors, shall receive compensation as follows: Said inspectors shall remit to the treasurer each month, at the time of making their monthly statements, one-third of all fees received by them in excess of twenty-five dollars per month: Provided, that when any inspector's receipts for a month shall, under the operation of this section, be such that two-thirds thereof shall exceed one hundred and twenty-five dollars, he shall remit to the treasurer all of said receipts in excess of said amount of one hundred and twenty-five dollars, less five per cent. Each inspector shall keep a record of the amounts of oils inspected, with the name of the person, corporation, or firm for whom said inspection is made, and also all the moneys received by him for said inspection, and he shall forward monthly reports on the first day of each month, containing an abstract from said record for the month preceding, to the commissioner of agriculture, and shall at the same time forward to the treasurer of the State all the moneys received by him as fees during that time, except what he is entitled to retain as his compensation. Said reports shall give the name of the inspector, or deputy, who inspected each lot of oil.

Sec. 1804. FEES. The following shall be the legal schedule of fees for official inspection of oils in this State: For inspecting lots of four hundred gallons and upwards, one-half cent per gallon; for inspecting in quantities of more than two hundred and less than four hundred gallons, one cent per gallon; for inspecting in quantities of less than two hundred gallons, one and one-half cents per gallon. There shall be no difference of charges in cases where the oil inspected is in barrels from charges where the oil is in bulk.

Sec. 1805. ADDITIONAL INSPECTORS. The commissioner of agriculture shall appoint inspectors at such other places in this State, in addition to the ten provided for, as in his judgment may be proper and necessary to insure the inspection of oils throughout the State. These additional inspectors may be appointed at any time when the commissioner of agriculture shall find that a necessity for said inspectors, or any of them, exists; they shall hold their office for the same time, and subject to the same conditions and duties, as inspectors herein provided for: Provided, that the compensation and bond of said inspectors shall be fixed in the same manner as in case of the ten inspectors provided for.

Sec. 1806. TERRITORY OF INSPECTION. Each of the said inspectors appointed under the terms of this Article shall, by themselves or their deputies, respond to all calls and demands for the inspection of oils from places within thirty miles of the town or city for which they were appointed. The mileage and traveling expenses allowed the inspectors under this Article need not be accounted for in their monthly statements, but are in the

nature of extra compensation allowed said inspectors for making inspections.

Sec. 1807. INSPECTION IN BULK. In all cases where oil is inspected in bulk, before said oil is put into barrels, it shall be the duty of the inspector to either see the oil so inspected put into barrels on which he has placed his official brand, or else he shall again take samples from among the barrels into which said bulk oil has been unloaded before he shall place his official brand upon said barrels: In his discretion, the official inspector may refuse to inspect oil in bulk, and require the owner or dealer in oils to put said oils into barrels or other packages for retail trade, before he will accord it an official inspection: Provided, always that no official inspection of bulk oils shall be made at any place in this State, except where said bulk oils are to be unloaded and put in barrels or other packages for retail trade.

Sec. 1808. USE OF OFFICIAL BRANDS. The official brands used by the inspectors of oils shall in no case be used for branding barrels or cases of illuminating oils by any other person than the regularly appointed inspector, or his deputy. In no case shall an inspector be a dealer in oils, or be in the employ of a dealer in oils, or have as his deputy any person dealing in oils or in the employ of any person or corporation so dealing in oil. Whenever any party desires to have oil inspected, he shall at the time of sending the order for inspection to the inspector, send a duplicate of the order to the commissioner of agriculture.

Sec. 1809. TEST OF OILS. No person shall manufacture or have in his possession, or sell, or give away for

illuminating or heating purposes in lamps or stoves within the State, any oil or burning fluid, wholly or partially composed of naphtha, coal oil, petroleum, or products thereof, or of other substances or materials, emitting an inflammable vapor which will flash at a temperature below 100 degrees Fahrenheit, when tested in the closed oil tester known as the New York State or Elliott Oil Tester, according to the following formula, to-wit: Fill the water bath with fresh well or hydrant water up to the lead mark on the inside. Then immerse the oil cup in the water and pour in oil so as to fill the cup up to within one-eighth of an inch of the plunge. Take a piece of blotting paper and remove all air-bubbles from the surface of the oil by lightly touching them with the paper. Next, carefully, with a dry towel or cloth, wipe the upper inner parts of the oil cup so as to remove any drops of oil that might have spattered on the upper part of the cup. Then put on the glass cover of the oil cup, pass thermometer through the hole in the cork to such a point that the mercury bulb will just be covered by the surface of the oil. Next light the lamp and introduce in under the water bath; so adjust the flame that the temperature will rise at the rate of two degrees a minute. Wait until temperature reaches 99 degrees F., then light a wooden toothpick and pass the flame through the semicircular opening in the glass plate at such angle as to clear the glass cover, and to a distance about half way between the oil and the cover. The motion should be steady and uniform, rapid and without pause. The appearance of a slight bluish flame shows that the flashing point has been reached. If the oil flashes at this point, it should be branded: "State of Georgia. Rejected." If it does not flash at this point,

it should be branded: "State of Georgia. Approved." Naphtha and other illuminating produces of petroleum, which will not stand the flash test required by this section, may be used for illuminating purposes or heating purposes in the following cases:

1. In street lamps and open air receptacles, apart from any building, factory, or inhabited house in which the vapor is burned.

2. In dwellings, factories or other places of business when vaporized in secure tanks of metal generators made for that purpose, in which the vapor so generated is used for lighting or heating.

3. For use in the manufacture of illuminating gas in gas manufactories, situated apart from dwellings and other buildings.

The inspector shall provide at his own expense instruments for testing oils and stencils for branding packages to read thus: "State of Georgia, Approved," with name of inspector and date of inspection. The inspector should brand all oils and fluids falling below degrees, flash test, in the Elliot Tester, "State of Georgia, Rejected," with the name of inspector and date of inspection. If the inspector shall find any illuminating oil or fluid under the flash test required by law, or falsely branded, he shall cause the offender to be prosecuted.

4. When the oil inspected shall stand a higher test, the inspector shall designate the same by his brand.

5. Inspectors, or other sworn clerks, or deputies, may enter any place where oils or illuminating fluids are kept

for sale or consumption in this State, and may reinspect any fluid which he has reason to suspect is below the standard. But no fee shall be charged for reinspection.

6. Any person selling oil in violation of this section, in addition to the penalty prescribed in the Penal Code, shall be liable to any person who shall sustain damage to property or person by reason thereof: provided reasonable prudence was used by the party injured while handling the fluid.

7. Inspectors shall inspect from time to time oil in the tanks of retail dealers, whether previously inspected or not; and if the fluid is below the standard, the same shall be seized, and after ten days' notice, be sold for redistillation only. Proceeds, after deducting necessary expenses of sale, notice and seizure, shall be turned over to the school fund of the county in which the seizure is made.

Sec. 1810. GENERAL INSPECTOR OF OILS. It shall be the duty of the commissioner of agriculture to appoint a general inspector of oils for the State, whose duty shall be to go from point to point about the State at the direction of the commissioner of agriculture to inspect such oils as may be desired, instruct the local inspectors in the art of taking fair, correct and impartial samples of oils for illuminating purposes, and to test the same, under the provisions of this Article, to check up all accounts and books of account of local oil inspectors, and to see that the said moneys due the State from fees paid for oil inspections are paid into the State Treasury, and to see that said local inspectors fairly, correctly and impartially discharge the duties imposed upon them by law, and per-

form such other duties as may be prescribed by the commissioner of agriculture.

Sec. 1811. SALARY OF GENERAL INSPECTOR. The general inspector shall be paid a salary not to exceed one hundred dollars per month, and actual and necessary traveling expenses, while in the discharge of his duties, and said salary and expenses shall be paid out of the fees collected from oil inspection: Provided, however, that this shall not be in conflict with other sections of the Code providing for the appointment and compensation of local oil inspectors.

Sec. 1812. STATE CHEMIST'S DECISION FINAL IN CASES OF DISPUTE. Whenever complaint is made to the department of agriculture in regard to the illuminating qualities of illuminating oils sold in this State, it shall be the duty of the general inspector of oils to secure samples of such oil complained of, which shall be turned over to the State Chemist, who shall thoroughly analyze and test said oil with reference to its illuminating quality. If, after analyzing and testing said oil the State Chemist shall decide that, although the oil be safe, it is yet of inferior illuminating quality, then the general inspector, on receipt of the State Chemist's report, shall brand such oil, "State of Georgia, Rejected. Quality Inferior", with his name and date of inspection. The State Chemist is hereby constituted the referee, whose decision shall be final in all cases of dispute regarding oils.

Sec. 1813. PENALTIES APPLY TO OILS OF INFERIOR QUALITY. The same penalties applying to oils which fail to meet the flash test, of the State of Georgia, shall also apply to oils of inferior illuminating quality.

Sec. 637. ILLEGAL USE OF OFFICIAL BRANDS. If any person shall use the official branding device of the inspector of oils, contrary to law, he shall be guilty of a misdemeanor.

Sec. 638. DUPLICATE OF REQUEST FOR INSPECTOR. Whenever a person desires to have oil inspected, he shall, at the time of sending the order for inspection to the inspector, send a duplicate of the order to the commissioner of agriculture; and for a failure to do so, he shall be guilty of a misdemeanor.

Sec. 639. ILLEGAL SALE OF ILLUMINATING FLUIDS. Any person who shall sell or offer for sale any of the illuminating fluids designated in Section 1809 of the Civil Code, in violation of the provisions of said section, shall be guilty of a misdemeanor.

Sec. 640. WRONGFUL USE OF BRANDED VESSELS. Any dealer in illuminating oils or fluids who shall receive, give away, buy, or sell any empty barrel or other packages from which said oil or fluid has been emptied, without first removing or defacing the inspector's brand, or shall refill such casks or other packages with uninspected oil or fluid for the purpose of sale, and shall sell or offer the same for sale without first having it inspected, shall be guilty of a misdemeanor; the fine, if one be imposed, to be devoted to the public school fund in the county in which the offense is committed.

Sec. 641. INSPECTOR, CLERK, OR DEPUTY VIOLATING LAW. All clerks and deputies of inspectors are

held amenable and subject to the penalties for violating any of the provisions of law regulating the inspection of coal and petroleum oils; and any inspector, inspector's clerk, or deputy, who fails to discharge the duties required of him by said law, or violates the same, shall be guilty of a misdemeanor.

Sec. 642. SALE OF UNINSPECTED OIL. If any person shall sell, or keep for sale, or in storage, any crude or refined petroleum naphtha, kerosene, earth-rock, coal, machine, or illuminating oil, the products of petroleum, earth-rock, or coal-oil, without having the same inspected and approved by an authorized inspector, he shall be guilty of a misdemeanor.

Sec. 642(a). LABELING GASOLINE, BENZINE OR NAPHTHA. (Any manufacturer, dealer or vender, failing to comply with the provisions of Section 1809(c) of the Civil Code, in regard to labeling casks, barrels or packages, containing gasoline, benzine or naphtha, shall be deemed guilty of a misdemeanor, and upon conviction therefor, shall be punished as prescribed in Section 1065 of this Code.)

Sec. 642 (b). ADULTERATION OF GASOLINE, BENZINE OR NAPHTHA. (Any manufacturer, vender or dealer who shall adulterate any gasoline, benzine or naphtha, as described in Section 1809(c) of the Civil Code, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as prescribed in Section 1065 of this Code.)

Sec. 642(c). LABELS ATTACHED TO PACKAGES BY RETAILERS. (Any retailer violating the provisions

of Section 1809(f) and 1809(g) of the Civil Code, with regard to attaching labels to barrels, casks, cans or packages containing gasoline, benzine or naphtha, shall be punished with a fine of not more than fifty dollars or imprisonment not to exceed thirty days, one or both in the discretion of the court.

Sec. 1065. MISDEMEANORS, HOW PUNISHED. Except where otherwise provided every crime declared to be a misdemeanor is punishable by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work on the chaingang on the public roads, or on such other public work as the county or State authorities may employ the chaingang, not to exceed twelve months, any one or more of these punishments in the discretion of the judge: Provided, that nothing herein contained shall authorize the giving the control of convicts to private persons, or their employment by the county or State authorities in such mechanical pursuits as will bring the product of their labor into competition with the products of free labor. If the convict be a female, the judge may, in his discretion, sentence her to labor and confinement in the woman's prison on the State farm, in lieu of a chaingang sentence, not to exceed twelve months: Provided, that the trial judge shall have the discretion also of sending any person convicted of a misdemeanor to the State farm.

Acts of 1912.

(p. 59)

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by the authority of the

same, That Section 1800 of the Code of Georgia of 1910 be, and the same is hereby amended by striking out all of said section after the word "appoint" in the third line thereof, and inserting in lieu thereof the following words: "ten inspectors of oils: provided, this Act shall not be construed to repeal Section 1805 of the Code of Georgia, which gives the commissioner of agriculture discretion to appoint additional inspectors. Inspectors of oils shall remit to the Treasurer, each month, at the time of making their monthly statements, all fees received by them, except that they may retain as compensation for their services the sum of ten dollars per car for oil inspected, and for small barrel lots inspected they shall receive all fees received until same exceeds ten dollars per month, and one-half of said fees received for inspecting small barrel lots less than car loads, thereafter during the same month, the total amount of compensation received for inspecting oils and gasoline and all other service of every character not to exceed one hundred dollars per month. Each inspector shall keep a record of the amounts of oil inspected with the name of the person, corporation or firm for whom said inspection is made, and also all moneys received for said inspection, and he shall forward monthly reports on the first day of each month to the commissioner of agriculture, and he shall at the same time forward to the Treasurer of the State the moneys received by him as fees during the time, except what he is entitled to retain as his compensation. Said reports shall give the name of the inspector or deputy who inspected each lot of oil."

Sec. 2. Be it further enacted by the authority afore-

said, That the provisions of Section 1803 of the Code of Georgia, 1910, prescribing the compensation of the inspectors of oils, conflicting with this Act be, and the same are, hereby repealed.

Sec. 3. Be it further enacted by the authority aforesaid, That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

Acts of 1912.

(p. 149)

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by the authority of the same, That after the passage of this Act, it shall be the duty of all inspectors of illuminating oils to inspect all gasolines, benzines and naphthas sold or offered for sale in this State.

Sec. 2. Be it further enacted by the authority aforesaid, That all inspectors shall receive the same compensation for inspecting gasolines, benzines and naphthas as is provided for in the inspection of illuminating oils. Each inspector shall keep a record of the amount of gasolines, benzines and naphthas inspected, with the name of the person or corporation for whom said inspection is made, and also all the moneys received by him for said inspection. He shall also forward monthly reports on the first day of each month to the Commissioner of Agriculture, and shall at the same time forward to the Treasurer of the State all moneys received by him as fees during that time, except what he is entitled to retain as his compensation. The entire compensation of any inspector, including

all services rendered the State, shall not exceed one hundred dollars per month.

Sec. 3. Be it further enacted by the authority aforesaid, That for the purpose of this Act, gasolines, benzines and naphthas shall be deemed to be subject to the same supervision and control as is now provided for illuminating oils, except that the inspectors are not required to test them other than to ascertain their specific gravity at 60° Fahrenheit, and it shall be unlawful for any manufacturer, dealer or vender, to sell, offer for sale, or keep in storage any petroleum product known as gasoline, benzine or naphtha, unless he shall label any casks, barrels or packages containing such products with figures denoting their gravity, and the words "Gasoline," "Benzine" or "Naphtha" in large red letters at least one and one-half inches in size. Provided that this requirement as to labeling shall not apply to car tanks, storage tanks or delivery wagons.

Upon failure to comply with the foregoing provisions, the offending person shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished as prescribed in Section 1065 of the Code of Georgia, and if any manufacturer, vender or dealer, shall adulterate any gasoline, benzine or naphtha with any injurious matter by increasing the bulk thereof by the addition of water thereto, he shall be subject to like penalty and shall be further liable to any party who may be injured for any resultant damages, to be recovered in a civil action.

Sec. 4. Be it further enacted by the authority aforesaid, That the following shall be the legal schedule of fees for

official inspection of gasolines, benzines and naphthas in this State: For inspecting lots of four hundred gallons and upwards, one-half cent per gallon; for inspecting in quantities of more than two hundred and less than four hundred gallons, one cent per gallon; for inspecting in quantities of less than two hundred gallons, one and one-half cents per gallon. There shall be no difference of charges in cases where the oil inspected is in barrels from charges where the oil is in bulk. The fees herein prescribed shall be paid by the owners of the gasolines, benzines and naphthas at the time inspections are made.

Sec. 5. Be it further enacted by the authority aforesaid, That every person dealing at retail in gasolines, benzines and naphthas in this State, shall after the first day of Jaunary, 1913, deliver same to the purchaser only in barrels, casks, cans or packages designated by labels securely pasted or attached thereto with the words "Gasoline," "Benzine" or "Naphtha," "Dangerous," "Inflammable," printed in bright red ink; provided, however, that this Section does not apply to tank wagons, or to car tanks or storage tanks. Nothing in this section shall prevent dealers from delivering gasoline by pumping or pouring same into automobiles.

Sec. 6. Be it further enacted by the authority aforesaid, that no dealer shall deliver kerosene in barrels, casks, cans or packages stenciled as set forth in Section 5 of this Act.

Sec. 7. Be it further enacted by the authority aforesaid, That any person violating the provisions of Sections 5 and 6 of this Act shall be punished with a fine of not

more than $50.00 (fifty dollars) or imprisonment not to exceed thirty days, one or both, in the discretion of the Court.

Sec. 8. Be it further enacted by the authority aforesaid, That the Commissioner of Agriculture shall cause to be enforced the provisions of this Act, and shall have the authority to make such rules and regulations governing the inspection, sale and storage of gasolines, benzines and naphthas as in his judgment will effectively carry out all the provisions of this Act.

Sec. 9. Be it further enacted by the authority aforesaid, That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed."

Acts of 1913.

Oil Inspection, Schedule of Fees Amended.

No. 258.

An Act to Amend an Act Entitled "An Act to Prescribe for the Inspection of Gasolines, Benzines, and Naphthas, Providing for the Fees, Tests, and for Other Purposes" Approved August 19, 1912, by Adding a New Section to Follow Section 4, and to be Numbered 4A, and for other purposes.

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by the authority of the same, That the Act Approved August 19, 1912, entitled "An Act to prescribe for the inspection of gasolines, benzines, and naphthas, providing for the fees, tests and

for other purposes," appearing in the published Acts of the General Assembly of 1912, on pages 149-152, inclusive, be amended by inserting after Section 4 a new section to be known as "Section 4a" as follows, to-wit:

"Section 4a. The provisions of this Act shall apply not only to gasoline, benzines and naphthas sold or offered for sale in the State of Georgia, but likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia for consumption or use. Where such commodities or any of them may be purchased within the State or without the State and brought into the State, by any person, firm or corporation, not for the purpose of selling or offering the same for sale, but for the use or consumption by the purchaser in manufacturing or other lawful uses, either as fuel or otherwise, the inspections herein prescribed shall be made, and the fees above fixed shall be paid therefor, except that no such purchaser shall be required to pay more than twelve hundred dollars per year for the inspection of all such commodities used or consumed by him as aforesaid, and such payments may in the discretion of the Commissioner of Agriculture, be divided into equal monthly payments of one hundred dollars each.

Sec. 2. Be it further enacted by the authority aforesaid, That this Act shall become effective upon the first day of the month succeeding its passage.

Sec. 3. Be it further enacted by the authority aforesaid, That all laws and parts of laws in conflict herewith be, and the same are, hereby repealed.

Approved August 19, 1913.

Acts of 1918.

Inspection of Gasoline, Benzine, Naphtha.

No. 453.

An Act to amend an Act approved August 12th, 1903, entitled An Act to provide for the inspection of gasolines, benzines, naphthas; providing for fees test by inserting after the word "tank" in line 10, Section 5, and before the word "nothing" the following: "If sold from a tank wagon, the person selling or delivering the same shall show on each sale ticket the gravity test of the gasoline, benzine or naphtha delivered to such retail dealer and for other purposes," so when thus amended said section shall read:

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by the authority of the same, That Section 5 of said Act shall read: "That every person dealing at retail in gasolines, benzines, and naphthas in this State shall from and after the passage of this Act deliver same to the purchasers only in barrels, casks, cans or packages, designated by labels securely pasted or attached thereto with the words "Gasoline", "Benzine", "Naphtha", "Dangerous", "Inflammable", printed in bright red ink; Provided, however, that this section does not apply to tank wagons or to car tanks or storage tanks; if sold from a tank wagon, the person selling or delivering the same shall show on each sale ticket the gravity test of the gasoline, benzine or naphtha delivered to such retail dealer. Nothing in this section shall prevent dealers from delivering gasoline by pumping or pouring same into automobiles."

Sec. 2. Be it further enacted, That all laws in conflict with this Act are hereby repealed.

Approved August 19, 1918.

Acts 1918.

(p. 53-54)

"45th. CORPORATIONS, FOREIGN. Upon every agent or representative of any foreign or non-resident corporation, said agent or representative having a place of business or office in this State, in addition to all other taxes now required of them by law, shall be and they are hereby required to pay an annual license or occupation tax fixed in accordance with the capital stock of corporation represented by them as specified in the preceding paragraph of this section (wherein is fixed the license or occupation tax required of all corporations chartered under the law of Georgia) for schedule or scale therein set forth. Provided, that if such foreign or non-resident corporation shall pay to the Comptroller-General of this State license tax prescribed as per said schedule for resident corporations, then such agents of foreign or non-resident corporations shall be relieved from said occupation tax, and to this end said foreign corporations shall register their names, capital stock and the names of their agents with the Comptroller-General at the beginning of each year, and upon said license or occupation tax or certificate or duplicate receipt for each agent that said tax has been paid and the presentation of such certificate or duplicate receipts by such agents to the tax collector of this county shall be sufficient evidence of such payment and authorize the agent to be relieved of such tax. The payment of

this tax shall not be construed so as to relieve the corporation or agent of any other license or occupation tax whatever. Provided, that this and Paragraph No. 44 of this Section shall not apply to insurance companies or to sewing machine companies, which are separately taxed in other paragraphs of this Act. Provided, further, that all returns by corporations, resident or non-resident, must be made under oath and when any corporation paying this license or occupation tax requires or demands more than two duplicate certificates for agents, then such corporation shall be required to pay an additional fee of one dollar for each duplicate certificate over and above the first two required.

In the Supreme Court

of the

United States

OCTOBER TERM, 1932.

No. [redacted]126

THE TEXAS COMPANY,
Plaintiff in Error,

vs.

A. A. BROWN, ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR

TABLE OF CONTENTS

PAGES.

STATEMENT OF THE CASE ..... 3— 9
The facts ..... 5— 9
The laws ..... 3— 5
The decree 9
THE ARGUMENT ..... 9—56
Construction of the law ..... 9—15
The law imposes no burden on interstate commerce and is not discriminatory or arbitrary .....15—50
The law is not in conflict with the Fourteenth Amendment .....50—52
The law is not in violation of the State Constitution .....52—56

TABLE OF CASES CITED

American Steel & Wire Co. vs. Speed, 192 U. S. 500, 19, 20, 21, 22, 25, 33, 34, 35, 44
Askren v. Continental Oil Co., 40 Sup. Ct. Rep. 355, 37, 38, 40, 46, 47, 48, 49
Atlanta Association vs. Stewart, 109 Ga. 80..... 53
Bacon vs. Illinois, 227 U. S. 504.....25, 26, 27, 33, 44
Banker vs. Pennsylvania, 222 U. S. 210..... 33
Bartels Northern Oil Co. v. Jackman, 150 N. W. (N. Dak.) 576 44
Brown vs. Houston, 114 U. S. 622....17, 18, 19, 20, 23, 25, 33, 45
Brown v. Maryland, 12 Wheat. 419..... 16
Burlington Lumber Co. vs. Willete, 118 Ill. 559.....23, 24
Carroll vs. Wright, 131 Ga. 728..... 55
Castle v. Mason, 110 N. E. (Ohio) 463..... 44
City of Rome vs. McWilliams, 52 Ga. 251..... 55
Davis v. Mayor, 64 Ga. 128..... 53
Diamond Match Co. v. Ontonagon, 188 U. S. 82.....23, 25
Farkas vs. Smith, 147 Ga. 503.....53, 55
Foote v. Stanley, 232 U. S. 494.....45, 46

General Oil Co. v. Crain, 209 U. S. 211.....23, 24, 25, 27, 33, 44
Gormley vs. Bunyan, 138 U. S. 323..... 41
Grundling v. Chicago, 177 U. S. 183..... 10
Hinson v. Lott, 8 Wall. 148, 75 U. S. 387..... 38
Home Ins. Co. vs. Augusta, 93 U. S. 116..... 14
Howe Machine Co. v. Gage, 100 U. S. 676..... 38
Johnson v. Mayor, 62 Ga. 645..... 52
Kehrer v. Stewart, 197 U. S. 60.....31, 53
Kelley vs. Rhoades, 188 U. S. 1..... 23
Leisy v. Hardin, 135 U. S. 100.....21, 34
License Tax cases, 5 Wall. 462..... 9
Lyng v. Michigan, 135 U. S. 161.....21, 34
McCray v. United States, 195 U. S. 27..... 51
McNeill vs. Sou. Rwy. Co., 202 U. S. 543..... 33
Martin vs. Pollock, 144 Ga. 608..... 53
Mayor vs. Cooper, 131 Ga. 673.....53, 54
Mutual Reserve Association vs. Augusta, 109 Ga. 73.....54, 55
Patton v. Brady, 184 U. S. 608.....39, 51, 53
Pittsburg & Southern Coal Co. v. Bates, 156 U. S. 577..19, 23, 25
Pittsburg & Southern Coal Co. v. Bates, 3 Sou. 642..... 33
R. R. Co. vs. Iowa, 233 U. S. 334.....27, 33
Ratterman v. Western U. T. Co., 127 U. S. 411..... 32
Royall v. Virginia, 116 U. S. 572..... 9
Ruling Case Law, Volume 6, Sections 73, 77 and 78.....29, 30
Ruling Case Law, Volume 15, Jud. Not., Section 15..... 41
Savannah vs. Cooper, 131 Ga. 670..... 55
Sawtell vs. Atlanta, 138 Ga. 687..... 55
Schollenberger v. Pennsylvania, 171 U. S. 1.....34, 35, 36
Singer Company vs. Alabama, 233 U. S. 304..... 32
Standard Oil Co. v. Graves, 249 U. S. 389,
13, 14, 40, 41, 42, 43, 44
Susquehanna Coal Co. v. South Amboy, 228 U. S. 665..26, 27, 28
Thomas vs. United States, 192 U. S. 363..... .39, 51, 53
Wagner vs. City of Covington..... 38
Walling v. Michigan, 116 U. S. 446.....36, 37
Welton v. Missouri, 91 U. S. 275.....36, 37, 38
Woodruff v. Parham, 8 Wall 123.....16, 20, 25, 45

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1920

No. 496

THE TEXAS COMPANY,
Plaintiff in Error,

vs.

J. J. BROWN, *Et Al.*,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

The Laws:

The law under consideration in this case was originally enacted by the General Assembly of the State of Georgia in 1890. (Acts of 1890-1, page 138.) This Act of 1890 was amended in 1899. (Acts of 1899, page 75.) These Acts were codified by the Gen-

eral Assembly in the Georgia Code of 1910, as Sections 1800 to 1814, inclusive, of the Civil Code, and as Sections 637 to 642, inclusive, of the Penal Code.

These Acts provide for the inspection and testing of heating and illuminating oils and fluids, for the appointment of inspectors, for a schedule of fees, and for the disposition thereof. By the Act of the General Assembly of 1912, it was provided that gasolines, benzines and naphthas should be subject to the same laws as are heating or illuminating oils and fluids, except that the inspectors are not required to test them other than to ascertain their specific gravity. (Acts of 1912, page 149.)

The aforementioned sections of the Code and the statute embrace the entire law involved in this case. The material provision of the law is found in Section 1809 of the Civil Code. It provides:

> "No person shall manufacture or have in his possession, or sell, or give away for illuminating or heating purposes in lamps or stoves within the State, any oil or burning fluid, wholly or partly composed of naphtha, coal oil, petroleum or products thereof, or of other substances or materials emitting an inflammable vapor which will flash at a temperature below 100 degrees Fahrenheit."

This section then prescribes the method of testing the oils, etc., and provides:

> "If the oil flashes at this point, it should be branded: 'State of Georgia, Rejected.' If it does not flash at this point, it should be branded: 'State of Georgia, Approved.'"

As heretofore stated, gasolines, benzines and naphthas are subject to this law, except that the inspectors are not required to test them other than to ascertain their specific gravity at 60 degrees Fahrenheit.

The law provides, in Section 638 of the Penal Code, a method

by which persons desiring to have oils, etc., inspected, may have such inspection made by an official inspector.

In Section 1806 of the Civil Code, it is provided that the official inspectors shall respond to all calls and demands for the inspection of oil from places within thirty (30) miles of the town or city for which they were appointed.

In Section 1807 of the Civil Code, it is provided:

> "In all cases where oil is inspected in bulk, before said oil is put into barrels, it shall be the duty of the inspector to either see the oil so inspected put into barrels on which he has placed his official brand, or else he shall again take samples from among the barrels into which said bulk oil has been unloaded, before he shall place his official brand upon said barrels. In his discretion, the official inspector may refuse to inspect oil in bulk, and require the owner or dealer in oils to put said oils into barrels or other packages for retail trade, before he will accord it an official inspection: provided, always, that no official inspection of bulk oils shall be made at any place in this State except where said bulk oils are to be unloaded and put in barrels or other packages for retail trade."

It is made unlawful for any person other than an official inspector to use the official branding device.

By Section 639 of the Penal Code, it is made unlawful and penal for any person to violate the provisions of said Section 1809 of the Civil Code.

The purpose of the bill in this case was to enjoin the enforcement of the provisions of the law hereinbefore set out, so far as they apply to the business of the plaintiff, on the alleged ground that the same are in conflict with the Constitution of the United States and of the State of Georgia.

The Facts:

The exact manner in which plaintiff conducts its business is not made clear, either in the bill itself or in its evidence.

It is alleged that the plaintiff is engaged in the business of manufacturing, refining, buying and selling petroleum and the products thereof, and that it is daily bringing into the State of Georgia from Texas, and other States of the United States, large quantities of kerosene oil and gasoline for the purpose of offering for sale and selling the same. It is alleged that said products of kerosene oil and gasoline are brought into the State of Georgia in tank cars, containing about eight thousand (8,000) gallons each. It is alleged that plaintiff maintains in the State of Georgia, tanks, warehouses, buildings, machinery and other equipment for receiving, shipping, handling, selling and distributing said products shipped, as herein stated, into the State of Georgia. (See Record, pages 3 to 5).

The use which plaintiff makes of its tanks, warehouses, buildings, machinery and other equipment in the State of Georgia is not shown, nor is the way and manner of handling and disposing of said products disclosed. However, the methods employed by the plaintiff in the conduct of its business are set forth clearly in the answer of the defendants and in their evidence in support thereof. (Record, pages 32 to 35 and 67 to 72.) Neither the evidence of the defendants nor the allegations of fact contained in their answer are controverted by the plaintiff, and both were evidently found to be true by the Court below.

According to the evidence of the defendants, which is undisputed, it appears that the plaintiff employs two methods in disposing of its products in this State.

First—In some instances, from points beyond the State, it sells, ships and delivers directly to purchasers in this State, oil and gasoline. These sales and deliveries are made in full tank car lots, the tank cars, in all instances, belonging to the plaintiff.

Second—It ships oil and gasoline into this State in its own cars, consigned to itself, at its local distributing stations, where the same is delivered to it by the railroads, and is placed in storage tanks and distributed therefrom as stock in trade, generally, to retail dealers and other purchasers in this State.

The plaintiff has thirty-four (34) local distributing stations in the State of Georgia, at each of which it maintains large sta-

tionary oil and gasoline tanks, pumps, warehouses, machinery and other apparatus used in connection therewith. Oil and gasoline are shipped into the State in large tank cars, the property of the plaintiff, consigned and delivered by the railroad companies to the plaintiff at the various distributing stations on the private or side tracks at said stationary tanks. When its cars are thus delivered by the railroad companies, the contents are conveyed directly from said tank cars into said stationary tanks and held in stock by the plaintiff for the purpose, generally, of selling and offering the same for sale to retail dealers and others in the State. When sold, said oil and gasoline are delivered by the plaintiff to its customers directly from said stationary tanks, or by means of wagons, or tank wagons, maintained by the plaintiff for this purpose, and filled from said stationary tanks. All the oil and gasoline handled by the plaintiff, with the exception of direct sales from beyond the State to purchasers in this State, are handled, sold, offered for sale and distributed in this way.

No oil or gasoline or other products handled by the plaintiff are inspected until they have reached their final destination at said local distributing stations within the State, and have been delivered by the railroad companies to the plaintiff. Usually, before a tank car arrives at a local distributing station, the plaintiff files a written request with the local oil inspector for the inspection of the car upon its arrival. It has a regular printed form for making these requests. The practice is that after the car referred to in said written request is delivered by the railroad company to the plainitff, the local agent, or manager of the local distributing station, orally notifies the local inspector and requests him to inspect the contents of the car. Such inspection is never made until the car has been placed upon private or side tracks at the stationary tanks for the purpose of being unloaded, and after it has been delivered by the railroad company to the plaintiff's manager or agent, and accepted and received by him. At the time said inspections are made, the cars are in the possession and under the control of the plaintiff at said station. At that time the oil and gasoline are inspected by the local inspector in the tank cars because said products are to be placed in said stationary tanks which already

contain other oil or gasoline previously inspected. It is for this reason only, and at the request of the plaintiff, and solely for the benefit of the plaintiff, that said inspections are made in said tank cars.

Defendants do not inspect the oil or gasoline, and the fees are never paid or required before the oil and gasoline have been delivered, to the plaintiff or its consignee, within this State, but such inspections are made only after the consignments have reached their final destination at said local distributing stations and are no longer in transit and are being held by the plaintiff, or its consignees, for the purpose of selling the same, or offering them for sale, in this State. Defendants construe the law as requiring inspection of oil and gasoline and other products that have ceased to be articles of interstate commerce and are at rest in this State as a part of the mass of property in this State. Where said products are shipped directly to purchasers, defendants have never required or demanded, and have no intention of requiring or demanding, that the same be inspected or the fees paid, before actual delivery to such purchaser for sale or storage. Where oil and gasoline in said tank cars, or other original receptacles, have been inspected, such inspections have been made solely because the plaintiff requested that same be made at said time and place, and solely for the convenience of the plaintiff. Defendants have never required oil or gasoline to be inspected while the same is in the hands of carriers, or while the same is in the hands of the plaintiff to be delivered to purchasers.

Where oil or gasoline or other products are shipped by the plaintiff to brokers in this State, or to other persons on consignment, the defendants do not insist or demand that the same be inspected or that the fees be paid before the same have been delivered to said broker or other person, but only after the same are in the hands of such broker or other person, and are being stored or sold or offered for sale by him to the retail trade in this State.

The defendants have always construed the law to mean that inspections should be made and fees paid only after said oil or gasoline has reached its destination in this State, and has been

delivered to the consignee in this State, and is held in storage by the consignee for the purpose of selling or offering the same for sale in this State.

The Decree:

Upon the state of facts above set forth, and as shown by the evidence, the Court below made the following rulings:

> (1) "We accordingly hold the Georgia statute unenforceable as against the importations by petitioner intended to be sold in the original packages and so sold.
>
> (2) "We accordingly hold that the importations of petitioner which are indefinitely stored within the State, or are resold there after breaking the original packages, are subject not only to inspection, but to the tax imposed, so soon as the interstate transportation of them is ended."

We most respectfully insist that under the facts disclosed by the evidence in this case, the holding of the Court was right.

ARGUMENT.

Construction of the Law:

The taxes provided for in the laws under consideration partake of the character both of inspection fees and of an excise or privilege or occupation tax. Speaking to this point in its opinion, the Court below said:

> "Such a fee, though imposed professedly as an inspection fee and under the police power, is really a tax, and must be justified as an exercise of the taxing power, if at all. Accordingly, the licensing of occupations, which is properly an exercise of the police power, may be accompanied by the exaction of fees for revenue. Notwithstanding the police guise, these are taxes and stand or fall as such; License Tax Cases, 5 Wal., 462; Royal vs. Virginia, 116 U. S., 572. Such exactions may be referrable to both the police and the taxing power at the same time, and are valid if

sustained by either or both powers. 'It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfills the two functions, one a reglating and the other a revenue function. So long as the State law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution.'" Grundling vs. Chicago, 177 U. S., 189.

We will undertake to discuss the points raised in the case in the same order in which they appear in the brief of counsel for plaintiff in error.

Counsel for the plaintiff in error, in the first place, in their brief, insist that the Georgia legislation is to be construed as providing for inspection and not for a privilege, excise or occupation tax.

It is insisted by counsel for the plaintiff in error that the Georgia legislation was not intended to provide for the exaction of a tax other than an inspection tax under the police power. Reference is made to the Acts of the General Assembly of Georgia of 1870 and 1880, and the titles of these Acts are quoted in the brief. It is said that all the various Acts of the General Assembly of Georgia, including said Acts of 1870 and 1880, are to be construed as an integer dealing with the same subject matter as an entirety, and that they are to be construed as intended to protect the public and not to raise revenue, for the reason that the titles to the said Acts of 1870 and 1880, refer only to the security of life and property from the dangers of coal and petroleum oils. This contention is totally without merit. It entirely overlooks the fact that said Acts of 1870 and 1880 are no longer of force in Georgia, and completely ignores the Act of 1890 and the Act of 1899.

In 1890, the entire law on the subject of the inspection of oils was revised, and the old Acts of 1870 and 1880 were superseded by the later Acts. The caption of the Act of 1890 was as follows:

> "To amend the laws of this State in reference to the inspection of illuminating oils by providing for the appointment of inspectors of oil; prescribing the amount of their compensation; revising the schedule of fees now prescribed by law for the inspection of oils; providing for the disposition of fees, and for other purposes."

This Act of 1890, with the amendment of 1899, was placed in the Code of Georgia of 1910, as Sections 1800 to 1814, both inclusive, and as Sections 637 to 642, both inclusive, in the Penal Code.

The Act of 1890 provided for the appointment of inspectors of oils and prescribed the manner and amount of their compensation. It provided a schedule of fees for such inspection, and prescribed the manner of making the inspections and the use of official brands. It also provided for the disposition of the revenue received from the inspection of oils, as follows:

> "Such inspectors shall remit to the Treasurer each month at the time of making their monthly statements, one-third of all fees received by them in excess of $25.00 per month, provided that when any inspector's receipts for a month shall, under the operation of this section, be such that two-thirds thereof shall exceed $125.00, he shall remit to the Treasurer all of said receipts in excess of said amount of $125.00. He shall also forward monthly reports on the first day of each month, containing an abstract from said record for the month preceding, to the Commissioner of Agriculture."

The Act of 1899 (Georgia Laws 1899, page 75), prescribed the method and manner of testing illuminating oils, and provided for the appointment of a general inspector of oils for the State, and prescribed his duties and compensation. The Act of

1899 was codified in the Code of 1910, as Sections 1809, 1810 and 1814. Thus, the Act of 1890 and the Act of 1899, as codified in the Code of 1910, as hereinbefore stated, constitute the entire law on the subject until the year 1912, with the exception of the Act of 1906, providing for the disposition of the funds arising from the inspection of oils.

In the year 1906, the General Assembly enacted a law providing that the Governor of the State should establish and cause to be maintained in each congressional district of the State, an industrial and agricultural school in accordance with the provisions of the Act. Said schools were to be branches of the State College of Agriculture and a department of the University of Georgia. The Act further provided that all fees received from the inspection of fertilizers, oils, and all other inspection fees received by the Department of Agriculture, over the expenses of such inspection, should be used as a fund for the purpose of establishing and maintaining such schools. See Georgia Laws 1906, page 72.

Thus the law stood until 1912, when it was amended so as to extend its provisions to include gasoline, benzine and naphtha. The law was further amended in 1913 in certain respects not material to this case. It thus appears that, in purpose and in effect, this law is a revenue law, as well as an inspection law, and was so intended by the General Assembly of the State. The Court is not bound by the tag which is placed upon the law, but will consider what the law is in substance and effect. The very fact that the law provides that only a portion of the fees received by the inspectors shall be retained by them, and that the remainder shall be covered into the State Treasury as public revenue, shows the purpose and intention of the legislature in the enactment of the law to impose both an inspection law and a revenue law.

In view of these facts, the Court below was not only authorized but required to find, as it did, the following:

> "Disregarding names, therefore, and going to the substance, the exaction sub judic, though called a fee and imposed in connection with an inspection, is found not only

to greatly exceed the cost of inspection but to have been intended to raise revenue. The charge for inspecting a tank car of petitioner's oil is $40.00, but, under the law, the inspector can keep but $10.00 for his services; and when his retentions reach $100.00 per month, the whole of it is paid into the State Treasury. Actual trial of the law has showed, for many years, an income to the State many times the cost of executing the inspection law. The fees were not reduced by the legislature, but the law was amended and extended, and the revenue increased, and has been specifically appropriated, from year to year, to the support of certain public institutions. *Both in purpose and in effect the law is a revenue law.*"

Counsel for plaintiff in error contend, in the second place, that, under the ruling of this Court, in the case of Standard Oil Company vs. Graves, 249 U. S., 389, the statute in the case at bar is to be construed as providing for inspection only, and not for a privilege, excise or occupation tax.

We respectfully insist that the ruling in the Graves case is not susceptible of any such construction. It was held in that case that the statute imposing the tax was void as an inspection law, because the tax was "obviously and largely in excess of the cost of inspection."

It was likewise held that the statute was void as a revenue measure, because its necessary effect was to impose a burden upon interstate commerce. The law was void on either theory. The Court did not undertake to classify the statute, since it was held void, either as a revenue measure or as an inspection law. The Court said:

> "It (the statute) must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void."

The Court said further:

> "The general principle that a State may not impose burdens upon interstate commerce is so well settled, and has

been so often declared in the opinions of this Court, that a repetition of the reasons which have induced these decisions would be superfluous. . . . . Under this law, the oils cannot be lawfully sold at all until the importer has paid the inspection fees provided in the statute, after inspection."

Counsel for plaintiff in error contend, in the third place, that the statute in question is to be construed as providing for inspection only, because the plaintiff has paid to the State of Georgia an occupation tax required by the laws of Georgia from foreign corporations. The following statement from the opinion of the Court below is a sufficient answer to this contention. The Court said:

> "The pleaded payment of the general corporation tax for doing business in the State is not a relief from taxes such as these: Home Insurance Co. vs. Augusta, 93 U. S., 116. The Act imposing the corporation tax, moreover expressly provides that the corporation tax is 'in addition to all other taxes now required of them by law,' and 'the payment of this tax shall not be construed so as to relieve the corporation or agent of any other license or occupation tax whatever;' Acts of 1918, page 54."

Counsel for plaintiff in error, in their brief, say:

> "But there is no other instance of which we are aware where a double occupation tax is imposed by the State for the privilege of doing business by a foreign corporation, should the inspection fees be construed as an occupation tax."

Counsel are in error. Under Sections 950 and 951 of the Civil Code of 1910, all corporations, both domestic and foreign, are subject to the general corporation tax. An examination of the law, as found in Sections 916, et seq., of the Civil Code, as amended by the Act of 1918, beginning on page 53, will disclose that specific and occupation taxes have, for many years,

been imposed upon various occupations or businesses carried on by corporations in addition to the general corporation tax. In fact, we believe it will be found that every corporation doing business in the State of Georgia pays both the general corporation tax as well as an occupation tax imposed upon the specific business in which it is engaged.

The Law Imposes No Burden on Interstate Commerce and Is Not Discriminatory Nor Arbitrary.

Counsel for plaintiff in error, in the second portion of their brief and argument, contend that "The Act burdens interstate commerce and is arbitrary and discriminatory in its nature."

We most respectfully insist that, construed as a revenue measure, as well as an inspection law, the legislation under consideration is not in conflict with the Constitution of the United States as imposing a burden upon interstate commerce, and that it is neither arbitrary nor discriminatory in its nature.

The specific ruling of the Court below, which is complained of by the plaintiff in error in this appeal, is as follows:

> *"We accordingly hold that the importations of petitioner which are indefinitely stored within the State, or are resold there after breaking the original packages, are subject not only to inspection, but to the tax imposed, so soon as the interstate transportation of them is ended."*

If this ruling is correct, the judgment of the lower Court will have to be affirmed.

An examination of the decisions of the Supreme Court of the United States will show that the following rules relating to interstate commerce have been consistently declared and followed by this Court, without a single exception:

1. Goods carried from one State into another State cease to be articles of interstate commerce at the point of time at which they reach their destination in the latter State.

2. There are only two limitations on the above rule, and these limitations are:

(a) The protection of the commerce clause of the Constitution of the United States extends far enough to prevent an absolute prohibition of the sale of goods by the original purchaser or consignee within the State.

(b) That power protects the goods, even after they have entered the State, from any burdens imposed *solely by reason of their foreign origin,* but does not protect them from any burdens not imposed for the purpose of discriminating against them on account of their foreign origin.

3. The several States have the power, after goods have arrived at their destination and are stored indefinitely awaiting sale or have not been sold in the original package, to tax them, without discrimination, like other property situated within the State.

In the case of Brown vs. Maryland, 12 Wheat, 419 (6 L. Ed., 684), it was held that taxation imposed by a State upon imported goods, whether levied directly on the goods imported, or indirectly, by burdening the right to dispose of them, is repugnant to that clause of the Constitution providing that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports."

It was also held in this case that where goods were exported from a foreign country, they preserved their character as such imports, and were not subject to either direct or indirect State taxation as long as they were unsold in the original packages in which they were imported.

In the case of Woodruff vs. Parham, 8 Wall, 123, (19 L. Ed., 382), it was held that the term "imports," as used in that clause of the Constitution which declares "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," does not refer to articles carried from one State into another, but relates only to articles imported from foreign countries into the United States. In that case the Supreme Court had under consideration an ordinance of the City of Mobile authorizing the collection of a tax on sales at auction. Woodruff

was an auctioneer, selling goods which were the products of other States than Alabama, receiving them as a consignee and selling them in the original and unbroken packages. He resisted the payment of the tax imposed upon him as an auctioneer. Since the ordinance made no discrimination between sales at auction of goods produced in Alabama and goods produced in other States, the Court held that the tax was constitutional. The Court said that a contrary result might have been reached under the ruling in Brown vs. Maryland if the constitutional prohibition referred to had been held to include imports from other States as well as imports from foreign countries, because at the time the tax was so laid the condition of the goods, in reference to their introduction into the State, was precisely the same in one case as in the other.

In the case of Brown vs. Houston, 114 U. S., 622 (29 L. Ed., 257), there was involved a tax imposed by the State of Louisiana upon coal mined in Pennsylvania. The coal was exported from Pennsylvania and carried on barges down the Mississippi river, consigned to the agents of the owners at New Orleans. After the arrival of the coal, it was held by the agents of the owners on barges afloat in the Mississippi river, and was being sold and offered for sale by them. While so held, the tax was imposed upon the coal. It was contended that the tax was a burden upon interstate commerce. As to this the Court said:

> "This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with or restriction upon the free introduction of the plaintiffs' coal from the State of Pennsylvania into the State of Louisiana, and the free disposal of the same in commerce in the latter State; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the States; or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the State until Congress shall see fit to interfere and make express regulations on the subject.

"It was not a tax imposed upon the coal as a foreign product, or as the produce of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. *The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day.* It had become a part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed.

"It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale. Take the City of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? *With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold,* and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one and made without discrimination between goods the product of New York, and goods the product of other States? Of course, the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of

interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. *But if, after their arrival within the State—that being their place of destination for use or trade—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to.*"

In the case of Pittsburgh & Southern Coal Co. vs. Bates, 156 U. S., 577 (39 L. Ed., 538), it appears that the Coal Company was engaged in the business of buying and selling coal from mines in Pennsylvania upon the Mississippi river. The coal was carried in vessels and barges down the river and was stopped wherever it was convenient and advantageous or necessary for the reception and disposition of the cargoes. The tax was laid upon movable property as stock on hand. At the time the tax was assessed the coal was contained in vessels moored in the river, and it was alleged that it was then, and had always remained in its original condition, and had never become mixed or incorporated with other property in that State. As to this tax the Court said:

"The decision of the Court in Brown vs. Houston, 114 U. S. 622 (29:257), thus rendered, seems to be conclusive of the case now before the court. The property in this case, as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States, in boats and barges to Louisiana for the purposes of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject when it becomes incorporated into the bulk of the property of the country, unless there be some special exemption set forth why it should not be thus taxed and sold, of which there is none here."

In the case of American Steel and Wire Co. vs. Speed, 192 U. S. 500 (52 L. Ed., 438), there is involved a merchants' tax and a privilege tax. The Wire Company maintained its principal office in Chicago, and had various factories in States other

than Tennessee. It manufactured nails, staples and wire. The nails and staples were placed in original packages or kegs, weighing one hundred pounds each, and the wire was placed upon rolls, weighing the same amount. Plaintiff had an extensive trade in the southwest, including Mississippi, Louisiana, Kentucky, Tennessee and other States. It established a distributing point at Memphis. All its contracts for the sale of its products were made from the Home Office in Chicago, and were usually made before the products were manufactured. To facilitate deliveries of its orders, the goods were carried down the Mississippi river on boats and placed in warehouses at Memphis, to be distributed in filling the original orders. The goods were consigned to the plaintiff's agent at Memphis, and were distributed from Memphis by plaintiff's agents. Nails and staples remained in the original kegs until delivered to the consumers, and the wire remained on the rolls until actually delivered to the purchasers. The tax was laid upon the privilege or business of conducting and maintaining the distributing station at Memphis, and it was both the general merchants' tax and a merchants' privilege tax. With reference to this tax, the Supreme Court said:

> "With these facts in hand, we are of opinion that the Court below was right in deciding that the goods were not in transit, but, on the contrary, had reached their destination at Memphis, and were there held in store at the risk of the steel company, to be sold and delivered as contracts for that purpose were completely consummated. All questions, therefore, as to the power of the State to levy the merchants' tax based on the contrary contention, being without merit, may be put out of view."

With reference to the cases of Woodruff vs. Parham and Brown vs. Houston, the Court said:

> "The doctrine upon which the cases rest was this: That imports, in the constitutional sense, embrace only goods brought from a foreign country, and consequently do not include merchandise shipped from one State to another.

The several States, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the States had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the State.

"Those two cases decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the States of the Union. The cases themselves have been approvingly referred to in decisions in this Court too numerous to be cited, and we, therefore, content ourselves by mentioning two of the cases where the doctrine was restated."

We especially call the attention of the Court to the fact that in this case it was contended by the Wire Company that the tax in question was a burden on interstate commerce and interfered with interstate commerce upon the authority of the law laid down by the court in the case of Leisy vs. Hardin, 135 U. S., 100, and Lyng vs. Michigan, 135 U. S., 161. It was contended that, under the authority of these cases, the goods could not be taxed while they remained unsold in the original packages in which they were brought into the State of Tennessee. The Supreme Court, however, held that these cases, as well as other cases referred to, did not go to the extent of holding that such property was not subject to taxation, but only that in such cases the State had no power to absolutely prohibit the sale of the goods in the original packages in which they were brought into the State. The reasoning of the Chief Justice on this point is so clear that we desire to quote his words. They are as follows:

"We might well leave the unsoundness of the proposition to be demonstrated by what we have previously said,

and also by the fact that, in Leisy vs. Hardin and Lyng vs. Michigan, and most of the similar cases relied on, the decisions in Woodruff vs. Parham and Brown vs. Houston were referred to without even an intimation that those cases were deemed to be overruled or even qualified. The earnestness with which the contention is pressed induces us, however, briefly to point out the misconception upon which it rests. *It results from assuming that the rule which governs in a case where there is an absolute prohibition is applicable where no such prohibition obtains.* Brown vs. Maryland illustrates the first of these cases, while Woodruff vs. Parham, Brown vs. Houston, Leisy vs. Hardin, Lyng vs. Michigan are examples of the other. Thus, in Brown vs. Maryland, there was an absolute want of power to tax imports, and it was held that a State enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. Woodruff vs. Parham and Brown vs. Houston, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a State so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in Brown vs. Maryland—that is, sale in the original packages at the point of destination—was applied. *The Court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the State, were enjoying the protection which the laws of the State afforded, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce.* In Leisy vs. Hardin and Lyng vs. Michi-

gan, the same question in a different aspect was presented. The goods had reached their destination and the question was not the power of the State to tax them, but its authority to treat the goods as not the subjects of interstate commerce, and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and, therefore, void."

The case of General Oil Co. vs. Crane, 209 U. S., 211, involved the validity of a tax upon the business of dealing in oil in the State of Tennessee. The Oil Company maintained wells and refining and manufacturing plants in the States of Pennsylvania and Ohio. It was engaged in the business of selling and delivering oil from these States, in the States of Arkansas, Louisiana and Mississippi. The oil was shipped to Memphis in tank cars and there unloaded for the purpose of distribution in other states than Tennessee. The plaintiff maintained two tanks; the first contained oil already sold in the States of Arkansas, Louisiana and Mississippi under contracts made before the oil was placed in the tanks at Memphis. The other tank contained oil intended to be sold in the States mentioned, but for which there were no orders at the time of shipment from the manufacturing plants. The oil was unloaded at Memphis only the purpose of distribution in smaller vessels to meet the requirements of such contracts and orders. It was alleged that the defendant, the Inspector of Oils, from time to time inspected plaintiff's oil and collected for such inspection a regular fee of twenty-five cents per barrel. The same objections were made to this law as are urged against the law involved in the case at bar. It was said that the tax was a burden on interstate commerce, and that the fees were much greater than necessary to provide for the inspection, and that it was in conflict with the Constitution of the State, which required all property to be taxed according to its value, and that taxes be equal and uniform throughout the State. These contentions were overruled on the authority of the cases of Brown vs. Houston; Pittsburgh & Southern Coal Co. vs. Bates; Diamond Match Co. vs. Ontonagon, 188 U. S., 82, and Kelley vs. Rhoades, 188 U. S., 1, and other cases. The Court refers to the case of Burlington Lumber Co. vs. Willete,

118 Ill., 559, in which the principle was recognized that property in transitu was not subject to the taxing power of the State, but that logs in rafts sent from Wisconsin to Burlington, Iowa, by the Mississippi river, and stopped at a place in Illinois called Boston Harbor, to be kept there until needed at Burlington for mill purposes, were subject to taxation. In that case, the court said that the property was kept at New Boston on account of the profit of the owners to keep it there, and that the company was engaged in business in the State beneficial to itself, and its property was so located as to claim protection of the laws of the State, and hence was liable to taxation. The Court said:

> "Like comment is applicable to plaintiff in error and its oil. The company was doing business in the State, and its property was receiving the protection of the State. Its oil was not in movement through the State. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in State, Detnold, Prosecutor, vs. Engle, supra, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there,—the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this, 'Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary in order to properly and convenienly unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil.'
>
> "This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to

rest in the State, and for which the protection of the State is necessary—a purpose outside of the mere transportation of the oil. This case, therefore, comes under the principle announced in American Steel & Wire Co. vs. Speed, 192 U. S., 500, L. Ed. 538, 24 Sup. Ct. Rep. 365."

In the case of Bacon vs. Illinois, 227 U. S. 502, the same principles were announced as in previous cases. Various persons in the Southern States had made contracts with railroads to tarnsport wheat from these States and deliver it in the States of New York and Pennsylvania. In the contracts the owners reserved the right to unload the wheat at Chicago for the purpose of weighing, inspecting, sacking, etc., and then to continue the transportation under the original contracts. Bacon purchased these contracts from the owners of the wheat and when the wheat arrived in Chicago, exercised his right to have the wheat placed in his elevator for the purposes specified. While the grain was in his elevator a tax was imposed upon it under the laws of Illinois. It was held that the property was subject to taxation under the authority of the cases of Woodruff vs. Parham; Brown vs. Houston; Pittsburgh & Southern Coal Co. vs. Bates; Diamond Match Co. vs. Ontonagon; American Steel & Wire Co. vs. Speed; General Oil Co. vs. Crane, and other cases. The Court said:

"But neither the fact that the grain had come from outside the State, nor the intention of the owner to send it to another State, and there to dispose of it, can be deemed controlling when the taxing power of the State of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported, and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not, as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was in his possession, with the

control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit, and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way, without discrimination.

"Thus, goods within the State may be made the subject of a non-discriminatory tax, though brought from another State, and held by the consignee for sale in the original packages.

"In the present case, the property was held within the State for purposes deemed by the owner to be beneficial; it was not in actual transportation; and there was nothing inconsistent with the Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the State, his share of the expenses of the local government."

In the case of Susquehanna Coal Co. vs. City of Amboy, 228 U. S., 665 (57 L. Ed., 1015), the Coal Company shipped from Pennsylvania into New Jersey, coal, and stored it at Amboy to await further shipment to other States when vessels should be available, and also, in the meantime, to sell the same. The purpose of the Coal Company was to have on hand coal to fill expected orders which would certainly come. In this way, only the business could be done. This coal was taxed, and the Coal Company sought to escape the tax and protect itself against such taxation on the ground that the coal was in interstate commerce, and, therefore exempt from local taxation.

The Supreme Court held that the coal was not in interstate commerce, and was subject to taxation, saying:

"The coal was not in actual movement through the State; it was at rest in the State, and was to be handled and distributed from there. Therefore, the principles expressed in General Oil Co. vs. Crain, 209 U. S., 211, 52 L. Ed., 574, and Bacon vs. Illinois, 227 U. S., 504, 57 L. Ed., 615, are applicable to it. The products in neither of those cases were destined for sale in the States where stored; the delay there was to be temporary—a postponement of their transportation to their destination. There was, however, a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the State. In both cases it was held that there was a cessation of interstate commerce and subjection to the dominion of the State."

In this case the Coal Company owned the mines from which the coal was *shipped* and consigned it to itself.

In Railroad Co. vs. Iowa, 233 U. S., 334, (58 L. Ed., 988), the facts were: A coal company at Davenport, Iowa, had shipped to it at that point coal from points beyond the State, for the purpose of reshipping it to other points in Iowa. This was done for the reason that the through rates on the coal from point of shipment to final destination in Iowa were greater than the interstate rates from the point of origin to Davenport, with the addition of the intrastate rates from Davenport to the final destination. Therefore, the coal company had its shipments of coal from original points out of the state billed to Davenport, and there it took out new bills of lading from Davenport to the place of final destination. To defeat this scheme, the railroad company took the position that the shipments were through shipments from the point of origin to final destination, and were, therefore interstate commerce and not subject to the interference of State regulations. The coal company insisted that they were intrastate commerce and subject to State regulations. The coal company tendered to the railroad company certain carloads of coal which had been delivered to it by the carriers at Davenport, and on which it had paid freight to the carriers, to be forwarded to points of destination within the State. The railroad company declined to accept the coal unless the cars were

unloaded and the coal loaded upon its own cars. The coal company applied for an order to the railroad commission, and the commission ordered the railroad company to accept the shipments in the cars in which the coal was brought to Davenport, and to forward it to place of destination. The railroad company refused to obey this order. Whereupon, the coal company appealed to the courts to compel obedience to the order of the commission, and the courts held that the order of the commission should be obeyed. An appeal was taken from this judgment to the Supreme Court of the United States, and this Court affirmed the judgment of the State Court, holding the interstate commerce character of the coal ceased when the coal arrived at Davenport, and was subject to State regulations. In the opinion, the Court discusses the question as to when interstate commerce ceases.

How stands the case at bar in the light of the legal principles set forth in the cases above cited?

It appears that the plaintiff employs two methods in selling its oil in this State.

First, in some instances, from points beyond the State, it sells, ships and delivers directly to purchasers in this State, oil and gasoline. These sales and deliveries are made in full tank car lots.

Second, it brings oil and gasoline into this State in its own cars, consigned to itself, at its local distributing stations, of which it has thirty-four, where the same is delivered to it by the railroads and is placed in storage tanks and distributed therefrom as stock in trade to retail dealers and other purchasers in this State in such qauntities as may be desired.

According to the evidence adduced on the trial of the case, the matter may be stated thus:

If the plaintiff in error, having its oil or other products in Texas, contracts to sell to John Doe, in Atlanta, Ga., a barrel or tank car of oil, or other product, such contract may be completely executed and the barrel or tank car shipped and delivered to Mr. Doe at Atlanta, Ga., and duly paid for by him

without any interference whatever from the operation of the law complained of.

If, on the other hand, the plaintiff in error, having its oil or other products in the State of Texas, ships the same in its own cars, consigned to itself, to one of its local distributing stations in the State of Georgia, and holds the same indefinitely at said station in its own possession and with full power of disposition, as stock in trade, to await orders for the sale thereof, they are made subject to the operation of the law so soon as the interstate transportation of the same is ended.

In respect to the first of these methods of doing business, that of direct sales to purchasers in this State from beyond the limits of this State, the Court below enjoined the enforcement of the law, saying:

> "We accordingly hold the Georgia statute unenforceable as against the importations by petitioner intended to be sold in the original packages and so sold."

We respectfully insist that, under the evidence in this case, there was shown no interference with interstate commerce as to this method of doing business. There is not a single provision in the statute which, by its terms or by necessary implication, requires that the oil and gasoline so sold, shipped and delivered directly to purchasers, be inspected, and the fees paid, while the same is in the hands of the plaintiff, or before it has been delivered to the purchasers, as was the case in the Washington and North Dakota and Alabama cases. To construe the law otherwise would render it unconstitutional.

In Section 73, Volume 6, R. C. L., page 75, it is said:

> "To justify a Court in pronouncing a legislative act unconstitutional, or a provision of a State Constitution to be in contravention of the Constitution of the United States, the case must be so clear as to be free from doubt."

A number of decisions of the Supreme Court of the United States are cited to sustain this proposition.

Section 77 of the same volume contains this statement:

> "It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it."

A large number of decisions of the Supreme Court of the United States are cited to sustain this propsition.

Section 78 of the same work says the following:

> "RESTRICTIVE INTERPRETATION—One important corollary of the general rule that it is the duty of the courts, if possible, to construe a statute so as to permit its provisions being upheld as constitutional is recognized in interpreting statutes which in their terms are broad enough to cover matters without as well as within the jurisdiction of the legislative body. The general rule is that within certain limits the courts, in order to uphold the statute, may restrict its application to the legitimate field of legislation unless the act clearly indicates a different intention on the part of its framers. Under this principle a retrospective operation need not be given to a statute which by its terms may be made to apply to past as well as to future matters, where such resrospective effect would make the statute unconstitutional. Similarly the rule is generally accepted that when a statute is broad enough to cover matters without the State as well as within, and as applied to matters without the State it would be unconstitutional, the court may restrict the application to matters within the jurisdiction of the State, unless the statute clearly indicates a different intent."

Decisions of the Supreme Court of the United States are cited to sustain the above statement of the law.

In the case at bar, each and every one of the defendants, including the officers charged with the duty of enforcing the law,

the Commissioner of Agriculture and the General Oil Inspector swear that they do not now and have never construed this law to apply to such contract sales to purchasers. They further swear that they have no purpose or intention to apply the law to such sales. They swear that they have not now and never had any intention to forbid or interfere with the transportation or delivery of such oil and gasoline to such purchasers in this State, either by any requirement that the oil or gasoline be inspected, or by the exaction of the fees thereon prior to the completion of such contracts of sale and the actual delivery of the oil to the purchaser. It is only when the purchaser of such oil or gasoline stores or sells or offers for sale the oil or gasoline in this State that the inspections are made and the fees paid, and not otherwise, except where a direct request is made that the same be inspected in any other manner for the special benefit and advantage of the purchaser or the seller. The request in such cases is granted as a convenience to the parties, but no requirement or demand other than as stated is imposed upon them in reference to the sale and delivery of the oil and gasoline. There was no ground, therefore, to enjoin the officers of the State from doing that which they have never done, are not doing, and have no intention, immediate or remote, of doing.

But, however this may be, it is not material in the present case, for the reason that the court below enjoined the enforcement of the law as applied to such method of carrying on the business of the plaintiff. It is obvious that the two methods of doing business are clearly distinguishable from each other, and that the tax as between taxable and non-taxable oil, is capable of severability. Speaking to this point, the Court below said:

> "Nor is there any difficulty about the severability of this tax as between taxable and non-taxable oil. Even where a lump sum was laid on a business which included both interstate commerce, which was non-taxable, and intrastate business, which was, the tax was held enforceable as to the latter; Kehrer vs. Stewart, 197 U. S., 60. When, as here, there is no lump tax, and the subjects of taxation are readily separated as being either interstate commerce or

otherwise, no question of severability can possibly arise; Ratterman vs. Western Union Tel. C., 127 U. S., 411; Singer Co. vs. Alabama, 233 U. S., 304."

We now consider the second of the methods pursued by the plaintiff in error in conducting its business in this State—that of storing its oil and gasoline in this State and of selling its own oil or gasoline stored within this State, or re-selling the same in this State, after breaking the original packages, in such quantities as its purchasers require, from its own thirty-four (34) local distributing stations, located in this State.

It is undisputed that all this oil and gasoline are brought into this State in tank cars belonging to the plaintiff in error. These cars are consigned to itself at the local distributing stations. They are delivered to the plaintiff in error by the railroads at such stations. They are placed by the railroads on the private tracks of the plaintiff in error at the local stationary tanks, where the oil and gasoline are intended to be stored in such stationary tanks and sold therefrom. The oil and gasoline are brought to the local tanks for the purpose of being there stored and kept in stock and sold at these identical places. They have come to their places of rest for final disposal or use in this State. It is then, and then only, that the inspections are made. All these facts are admitted. How can it be said, then, in view of these admitted facts, that the oil and gasoline have not reached their destination in this State, but are still in transit, when the cars have reached the local distributing stations and have been delivered to the plaintiff in error and are in the possession of the plaintiff in error? If they have reached their final destination and are no longer in transit, and are held by the plaintiff in error with the control of absolute ownership, they are no longer articles of interstate commerce, so far as local taxation is concerned.

The fact that such oils must inevitably meet the tax before they can be used otherwise than for sale in the original packages is not material. This is true of all general taxation. If there is no discrimination because of their being imported, they pass under the taxing power of the State, as under its protec-

tion, so soon as they pass out of interstate commerce by a sale or breaking of the original package by the importer or by indefinite storage. General Oil Co. vs. Crain, 209 U. S., 211; American Steel Wire Co. vs. Speed, 192 U. S., 500; Banker vs. Pennsylvania, 222 U. S., 210; Bacon vs. Illinois, 227 U. S., 502.

But it is said that the inspections are made while the oil and gasoline are in the tank cars. This fact does not alter the case. The property has reached its destination. It has come to its place of rest for final disposal and use. The transportation has ended and the property is to remain there until finally disposed of by the owner. In the case of Pittsburgh & Southern Coal Co. v. Bates, 3 Sou., 642, it is said:

> "It is immaterial whether they are unloaded or not,—were or were not consigned to any specially authorized agent within the State of destination. It is enough that they were in the charge and custody of one who had the power to sell, who disposed of the same in part, and is ready to do so for the rest. Taxation in such cases, in the absence of contrary congressional legislation, does not violate the constitution of the United States."

In the case of Brown v. Houston, the coal remained on the original barges which were in the Mississippi River at the time the tax levy was made. In the case of the Railroad Co. vs. Iowa, 233 U. S., 334, the coal remained in the same cars in which it arrived at Davenport. At Davenport it was tendered in these same cars to the railroad company for transportation to its ultimate destination. The Court held that interstate commerce had ceased at the time the cars were tendered to the railroad company for transportation to the final destination, although it remained in the original cars in which it was brought into the State. In the case of McNeill v. Southern Railway Co., 202 U. S., 543, it was held that when cars have not been delivered to the consignee, upon a private siding, but remain upon the tracks of the railway company, the interstate transportation of the property has not been completed. If, however, it should appear that the cars have been delivered and are upon the tracks

of the plaintiff, then the interstate transportation has been completed and the oil is no longer in transit.

However this may be, we again respectfully call the attention of the court to the fact that the only reason for inspecting the oil while it is in the tank cars is that the plaintiff desires it to be so inspected at that time and requests that it be so inspected. It is inspected in the tank cars solely for the benefit of the plaintiff and solely because of the said request. Defendants all swear that they do not require or demand that the oil be inspected while in the tank cars, but that the plaintiff requests the inspection to be made at that time, and that it is so made for that reason.

From what is said above, it is clear that the goods have ceased to be articles of interstate commerce, so far as taxation is concerned at the time they become subject to the law in question, and that this law is valid and constitutional unless it (1) appears to prohibit the sale of the goods, or (2) imposes a burden upon their sale *solely by reason of their foreign origin.*

We maintain that the protection of the interstate commerce clause of the Constitution goes no farther than to forbid an absolute prohibition of the sale of the goods after they have reached their destination. The plaintiff contends *that the goods cannot be taxed until after the first sale has been made.* We are cited to the cases of Schollenberger vs. Pennsylvania, 171 U. S., 1; Leisy vs. Hardin, 135 U. S., 100; Lyng vs. Michigan, 135 U. S., 161. An examination of these cases discloses that they do not deal with taxation, but with an attempt on the part of the State to absolutely prohibit the sale of the goods at all. On the contrary, in the case of American Steel & Wire Co. vs. Speed, 192 U. S., 500, the Supreme Court clearly distinguishes these cases from cases involving taxation of the goods and says:

> *"The Court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the State, were enjoying the protection which the laws of the State afforded, and were taxed with-*

out discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce.''

The Court further says that the rule permitting the taxation of such goods was as laid down in the cases of *Woodruff v. Parham, Brown v. Houston,* and concludes:

> ''Those two cases decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years by all the States of the Union. The cases themselves have been approvingly referred to in decisions in this court too numerous to be cited.''

The question of taxation was not involved in the case of Schollenberger vs. Pennsylvania, 171 U. S., 1, but only an effort on the part of the State of Pennsylvania *to wholly exclude therefrom an article of interstate commerce.* The Act under consideration provided ''that no person, etc., shall manufacture out of any oleaginous substance, or any compound of the same, etc., any article destined to take the place of butter and cheese, etc., or of any imitation of adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell the same as an article of food.''

With reference to this statute, the Court declared:

> ''The general rule to be deduced from the decisions of this Court is *that a lawful article of commerce cannot be wholly excluded from importation into a State from another State where it was manufactured or grown.* The State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.''

The contention of the plaintiff in error is that, although the goods have reached their final destination in this State and are being held by the owner in storage indefinitely for sale or use, or are being held by him for sale or use after breaking the original packages, they are not subject to taxation. We insist that the question involved is not a question of inspection. Neither is it a question of the power of the State absolutely to prohibit the sale of the goods in the original packages or otherwise. It is simply a question of taxation. The State has the power to require the inspection of the goods and the payment of a reasonable fee therefor, whether the goods be intrastate or interstate. It has no power to absolutely forbid the sale of the goods. *But it has the power to tax the goods so soon as the interstate transportation and delivery of them is completed.*

We confidently maintain the proposition that where goods are shipped from one State into another and reach their destination, and are at rest in the latter State, in the hands of the owner or his agent, in original packages or otherwise, it has never been held by the Supreme Court of the United States, or any other court, that such goods cannot be taxed in the latter State until after the first sale thereof. Such a holding would be inconceivable. *The goods could remain in the original packages or receptacles, enjoying the protection of the laws of the State, for forty years, or be consumed in the use, and never be subject to any taxes at all.*

So far as inspection is concerned, it is not prohibition of the sale. It is a condition of sale. All the States have the right to have goods inspected even in interstate commerce, and to make such inspection a condition of sale in the State. If the States may require inspection of interstate goods as a condition of sale, certainly they may impose inspection laws on intrastate goods, or goods that have ceased to have any interstate character.

The only other limitation on the rule that interstate goods cease to be articles of interstate commerce when they reach their destination, is that such goods are exempt from any burdens imposed *solely by reason of their foreign origin.* On this branch of the case we are cited to the cases of Welton v. Missouri, 91 U. S. 275, and Walling v. Michigan, 116 U. S., 446.

Neither of these cases is authority for the contention of the plaintiff in the case at bar.

In the Welton case, the statute provided in express terms that whoever should deal in the sale of goods, wares or merchandise which were not the growth, produce or manufacture of the State, should be deemed a peddler and subject to a tax. Penalties were imposed for failure to pay the tax. No tax was imposed upon persons selling goods, wares or merchandise as peddlers which were the growth, produce or manufacture of the State. The only holding in the case was that the statute, in express terms, discriminated against goods produced outside of the State by imposing a tax upon their sale within the State, because no similar tax was imposed upon goods produced within the State. Of course, a statute which places a tax upon goods of a foreign State and, at the same time, exempts similar goods produced within the State, imposes a burden on the foreign goods *solely by reason of their foreign origin.* So much for that case.

Precisely the same set of facts was encountered in the other case, to-wit: Walling v. Michigan. The Court held that the State law which imposed a specific tax on persons engaged in the business of selling liquors to be shipped into the State from places out of the State, without imposing a like tax upon persons engaged in a like business in reference to liquor manufactured in the State, was unconstitutional and void. It has been a long time—1884—since this principle has been questioned. The law involved in the case at bar is not subject to attach on that ground. By its terms it applies to all crude or uninspected oil and gasoline, regardless of whether it is taken from wells in this State, or other States, and regardless of whether it is refined in this State or some other State, and regardless of whether it was imported into this State or is found here originally. The fact that most, if not all, of the oil and gasoline affected is foreign is merely an incident. The law applies to all oil and gasoline, without reference to its origin. The contention of the plaintiff that no oil wells or refineries are located in this State is effectually disposed of by the Supreme Court, in the case of Askren v. Continental Oil Co. (U. S. Sup. Ct. Opin-

ions, 1919-1920, No. 13372, 455), which we will consider later. In this case it was said:

> "So long as there is no discrimination against the products of another State, *and none is shown from the mere fact that the gasoline is produced in another State*, the gasoline thus stored and dealt in is not beyond the taxing power of the State. Wagner vs. City of Covington, decided December 8, 1919."

To show the unsoundness of plaintiff's contention in this matter, we call the Court's attention to the case of Howe Machine Co. v. Gage, 100 U. S., 676, in which it was held that a State tax on peddlers of sewing machines, which applies alike to sewing machines manufactured in the State and out of it, is valid, and not repugnant to the Constitution of the United States. Likewise, in the case of Hinson v. Lott, 8 Wall, 148, 75 U. S., 387, it was held that where a State imposed the same rate of taxation upon like articles, whether brought from another State or the products of the State imposing the tax, the tax may be enforced.

It is not questioned that the several States have the power, after goods have arrived at their destination and have not been sold in the original package, to tax them, without discrimination, like other properties situated within the State. In the case of Welton v. Missouri, 91 U. S., 375, a case cited by the plaintiff, it is said:

> "The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Government. *Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods or indirectly from them through the license to the dealer.*"

Since the goods involved in the case at bar have arrived at their final destination in this State and are stored indefinitely awaiting sales, or are intended to be sold after breaking the original packages, they may be taxed like other property situated within the State under a law which makes no discrimination by reason of their foreign origin. This tax is not arbitrary. It is imposed upon a well-defined business and a well-defined class of dealers. It resembles excises commonly laid by the United States upon articles and transactions, evidenced by stamps or brands affixed to the articles. (See Patton vs. Brady, 184 U. S., 608, and Thomas vs. United States, 192 U. S., 363). Perhaps it is best described by the term "privilege tax" used by the Supreme Court in the Graves case. The legislature, by reason of the danger of oils whose qualities are uncertain, might have prohibited the storage or sale of them, and certainly could do so unless they be inspected. The privilege of storage and sale after inspection is what the tax is for.

The tax is imposed upon the business of dealing in untaxed and uninspected oil and gasoline in this State. These articles come into the hands of such dealers untaxed and uninspected. They are required to pay a tax and have such articles inspected. These initial handlers and dealers alone handle uninspected oil and gasoline. For the most part, they are wholesale dealers and may be classed as such. They are responsible for the condition of the oil and gasoline dealt in within the State. Their business is clearly distinguishable from the business of other dealers in the same articles. The latter have nothing to do with the production or manufacture or refining of these products. They purchase these articles from the initial dealers, and are engaged in the business of handling such articles which have been inspected and upon which the tax has been paid. To impose a tax upon this latter class of dealers would, in effect, amount to double taxation.

The State certainly has the right to inspect oil and gasoline held at the local distributing stations, and to charge a reasonable fee for such inspection. That much is settled. After the interstate transportation of the goods is ended, the State certainly has the right to impose a tax upon the business or privi-

lege of dealing in untaxed oil and gasoline. The class of dealers handling such articles is made subject to the tax, and the amount of the tax is regulated by the number of gallons so handled by them. It is no objection to this form of taxation that its imposition is made to accompany the process of inspection. The State may levy both forms of taxation, and the revenue tax is more readily and accurately assessed and collected when its assessment and collection accompany the process of inspection. Otherwise, one set of officers would be required to inspect the oil and collect inspection fees, and another set of officers to examine the oil and gasoline, measure them and assess and collect the revenue tax thereon. The class of dealers upon which the tax is laid is clearly distinguishable upon a basis of reason from other classes dealing in oil and gasoline.

The fact that the initial handlers and dealers in oil and gasoline happen to be importers, makes not the slightest difference, because it is not the importation of oil and gasoline that is taxed. The tax applies to all uninspected oil and gasoline, regardless of whether these products are taken from wells in this State or other States, or are refined in this State or some other State, or were manufactured in this State or some other State. Classification, therefore, of the business of persons engaged in the handling of such products, and enjoying the privilege of selling, offering for sale and storing such products, is a natural and reasonable classification.

But counsel for plaintiff say that the whole matter has been settled by the case of Standard Oil Co. v. Graves. In their brief they declare, "It is admitted that before the emptying of the tank cars of plaintiff, the inspection is made from the original tank cars. With these facts admitted, the Graves case demands a declaration by this court that the inspection laws of Georgia be declared void." This is but the cocksureness of able and ardent counsel overlooking the vital and controlling factors in the case.

We will inquire whether the decision of the court in the Graves case, illuminated by the further decision of the same court in the case of Askren v. New Mexico, et al., decided April

20, 1920, demands a declaration of the invalidity of the Georgia laws?

All the material provisions of the law of Washington are not set forth in the opinion in the Graves case. However, this Court takes judicial notice of the laws and statutes of all the States of the Union. 15 R. C. L. and Jud. Not., Section 15; Gormley v. Bunyan, 138 U. S., 323. The law involved in that case was as follows (italics ours):

> "*All gasoline,* benzine, distillate or other volatile product of petroleum intended for use or consumption in this State for illuminating, manufacturing, domestic or power purposes, *before being sold or offered for sale* by any firm, corporation, manufacturer, dealer, vendor, or other person, *shall first be inspected and tested for its specific gravity,* and, *after having been so inspected and tested, the State Oil Inspector,* or his deputies, *shall issue a certificate of inspection thereof and shall cause every package, barrel, cask or other receptacle thereof to be labeled or branded with its exact specific gravity over his official signature.*
>
> "*If any person or persons,* whether manufacturer, vendor or dealer, or as agent or representative of any manufacturer, vendor, or dealer, *shall sell or attempt to sell to any person,* firm, or corporation *in this State, any illuminating oil,* gasoline, benzine, distillate or any volatile product of petroleum, intended for use or consumption within this State for illuminating, manufacturing, domestic or power purposes, *that has not been inspected and branded according to the provisions of this act;* or shall sell or offer for sale any rejected oil or other product of petroleum for consumption within this State; or shall use any package, cask, barrel or other receptacle having the brand of the State Oil Inspector thereon, without the oils, gasoline, benzine, distillate or other petroleum products therein having been so inspected; or shall sell or dispose of any empty barrel, cask, package or other receptacle before thoroughly cancelling, removing or effacing the inscription brand on the same; or who shall alter or change or counterfeit any certificate, inspection

brand or label, *he shall be deemed guilty of a misdemeanor,* and upon conviction thereof shall be punished by a fine in any sum not exceeding Three Hundred ($300.00) Dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

In the Graves case, the plaintiff alleged that it was engaged, in the State of California, in the business of producing and buying crude petroleum, and in manufacturing and refining the same and of shipping said products from California into the State of Washington, where the same were sold in large quantities for use and consumption. The manner of conducting the business was not alleged. It was stated that the plaintiff maintained wharves and docks, tanks, warehouses, buildings and machinery for receiving, shipping and handling and selling said products. The manner in which these appliances were used was not stated. The case was heard upon demurrer, which admitted the allegations of the petition. The petition was so drawn that it was capable of being construed to mean that the plaintiff was selling, shipping and delivering the products mentioned from its refineries in California directly to purchasers in the State of Washington. Certainly the facts alleged were capable of bearing the construction that at least some of said products were sold by the plaintiff in the State of Washington in this way. The Act provided that before any sale of said products could be made "every package, barrel, cask or other receptacle" in which they were brought into the State should be "branded" by the State Oil Inspector, or his deputy. The branding could only take place after the oil had been inspected and the fees paid. It was provided that any person who should sell or attempt to sell to any person in the State of Washington any of said oil that had not been inspected and branded should be deemed guilty of a misdemeanor. The law, therefore, clearly applied to sales of oil or gasoline made by the plaintiff from its refineries in California directly to purchasers in Washington. Such sales could not be made, nor delivery effected, until after the oil had been inspected and the original receptacles or containers in which it was brought into the State had been branded. It did not appear what part of plaintiff's business was of this

character. Some of said business, however, was of this character. The law applied to all sales, including sales in interstate commerce. The court held nothing more than that where such direct sales were made, under the Federal Constitution, they were protected until the oil or gasoline had been delivered to the purchasers, and certainly while the same were in original receptacles or containers in which they were brought into the State. The reason given by the court as the basis for the decision was that the law applied to direct sales in interstate commerce as well as to intrastate sales from local distributing stations. This is made clear by the language used by the court, as follows:

> "Under this law the oils *cannot be lawfully sold at all* until the importer has paid the inspection fees provided in the statute, after inspection."

This decision is made clear by the following language:

> "We reach the conclusion that the statute imposing this excessive inspection fee, in the manner stated, *upon all sales of oils brought into the State in interstate commerce,* necersarily imposes a direct burden upon such commerce, and is, therefore, violative of the commerce clause of the Federal Constitution."

We respectfully insist that the court did not hold and did not mean to hold that where the oils were brought into the State by the plaintiff and delivered to the plaintiff and held by it at the place of final destination in the State of Washington, where they were to be finally sold in such quantities as their purchasers might require, they were not subject to taxation as other property in the State. We respectfully insist that so far as the statute applied to oils handled in this manner, the court did not intend to hold that it was an interference with interstate commerce.

In the Graves case, the court refers to the fact that the Supreme Courts of North Dakota and Ohio had reached the same conclusion as that announced in the Graves case. If so, the construction we place upon the decision in the Graves case is

the correct one. In the case of Bartels Northern Oil Co. v. Jackman, 150 N. W., 576, one of the cases referred to, it appears that the statute in question provided that each transportation company was required to stop and hold for inspection at ports of entry all consignments of oil, and that a fee of twenty-five cents for testing each barrel of fifty gallons, or less, was required to be paid by the consignor. Thus that law operated directly upon goods in transit and while in the hands of the carrier, and the consignor was required to pay the fee before the interstate goods could be delivered by him. This is in perfect accord with the construction which we place upon the Graves case, to-wit: that it refers to direct sales and deliveries from the plaintiff to its purchasers in Washington, and not otherwise.

In the case of Castle v. Mason, 110 N. E., 463, the other case referred to by the Supreme Court, it appears that the decision was based upon the fact that the statute in question was not capable of such a construction as would apply its terms only to intrastate goods. The Court says:

> "So that neither the amended petition nor the inspection act can be susceptible to such a construction as would apply its provisions to packages which had become intrastate."

We construe the decision in the Graves case to mean that where oils were sold from the refineries in California direct to purchasers in the State of Washington, to be shipped and delivered in the original receptacles or containers in which they were brought into the State, such original receptacles or containers, and the oils therein contained, were protected by the interstate commerce clause until they were delivered to such purchasers, or in case the oils were shipped to the plaintiff itself in original receptacles or containers, that it was protected by the interstate commerce clause until it reached its destination in Washington and was delivered to the plaintiff at its final destination. If this construction of that decision is correct, then the decision is in complete harmony with the prior decisions in the cases of the General Oil Co. v. Crane, American Steel & Wire Co. v. Speed, Bacon v. Illinois, as well as other cases too numerous to mention. In this view of the case, it is also in complete har-

mony with the cases of Woodruff v. Parham, and Brown v. Houston, which the same court says have never been questioned, and have become the foundation for the exertion of the power of taxation in all of the States of the Union. If the Graves case means that oils brought into the State and consigned to the plaintiff, and delivered to the plaintiff, and held by the plaintiff in storage indefinitely, or after breaking the original package, at the place of final destination, for sale or consumption, are still under the protection of the commerce clause of the Constitution, and *not subject to State taxation,* then it overturns and overrules all the cases referred to, which are too numerous to mention, which cover a period extending from 1869 to the present time, and which have become the foundation for the exertion of the taxing power of all the States of the Union. Counsel for plaintiff in error in their argument, in effect, contend, and it is necessary for them to contend, that such was the effect of the decision in the Graves case. It certainly appears passingly strange that if the Supreme Court intended to overrule all these numerous cases, and to overturn a doctrine heretofore recognized for a period of more than fifty years, no such purpose was stated or even intimated in the opinion. We respectfully submit that no such purpose was intended by the court in that case.

Plaintiff contends that this case is controlled by the case of Foote v. Stanley, 232 U. S., 494. We respectfully insist that this case is not in point. In the first place, the question as to whether or not the goods were interstate when inspected was not raised nor decided. It was conceded that the goods were in transit. The material provisions of the Act provided:

> "A charge of one cent per bushel is hereby levied to help defray the expenses of such inspections and the other expenses of the State fishery force, upon all oysters unloaded from vessels *at the place where said oysters are to be no further shipped in bulk in vessels.*"

The Act further provided:

> ". . . and all transportation companies carrying oysters in the shell, consigned to Baltimore, shall furnish to the

Oyster Inspector or Collector of oyster tax, a copy of his manifest showing the number of bushels on board on arrival of steamer, and to whom consigned."

The Act further provided that the Inspector should issue a form of certificate, reading as follows:

"I hereby certify that I have this day inspected for Capt....., Schooner....., a cargo of oysters, sold to....., and found the same to contain.....bushels of merchantable oysters and.....bushels of unmerchantable oysters.

Signed....."

It will be noted that, under the provisions of this law, the oysters could not be unloaded or delivered until after they had been inspected and a certificate issued. By its very terms it required that the oysters be inspected while in transit and in the hands of the transportation company, or carrier. Also, the oysters were to be inspected at the place where they were to be no further shipped in bulk in vessels. A mere change in the form of transportation from vessels to cars or other means of conveyance would not destroy the interstate character of the transportation. Under this Act, if the goods were to be shipped beyond the ports at Baltimore, this interstate movement was interfered with during the course of transportation. The goods were required to be inspected before they had reached their destination, and in all events before they could be delivered to the purchaser or consignee. Clearly, the oysters at the time they were inspected, were in transit and were, therefore, articles of interstate commerce. That decision has no bearing on the case at bar, where the goods are shown to have reached their destination, and to have been delivered and to be held at rest as stock in trade in the State, in the hands of the purchasers or owners.

We respectfully insist that the principles announced in the case of Askren et al. v. Continental Oil Company, the New Mexico case (U. S. Sup. Ct. Opinions, 1919-1920, No. 133, p. 455), fully sustain our contention in the case at bar. In that case

the statute imposed an excise tax upon distributors and retail dealers in gasoline. Each distributor was required to pay $50.00 per annum for each distributing station, or place of business and agency. A tax of $5.00 was imposed upon each place of business of retail dealers. A tax of two cents per gallon was imposed upon all gasoline so sold or used.

A distributor was defined to be "every person, corporation, firm, co-partnership and association who sells gasoline from *tank cars, receiving tanks* or *stations*, or in or *from tanks, barrels,* or *packages not purchased from a licensed distributor* of *gasoline in this State.*"

The plaintiffs alleged that they were engaged in two classes of business. First, they buy oil in certain States and ship it in tank cars from the State where purchased into the State of New Mexico, where, according to their custom and the ordinary method, in the conduct of their business, they sell the whole contents of the said cars to single customers without breaking the original package. Also, they purchase in certain States gasoline, and ship it in barrels and packages to New Mexico, where, in the usual and ordinary conduct of their business, it is sold to customers without breaking the original barrels or packages. Plaintiffs alleged that this manner of sale made them distributors, and that they were required by the State to pay the distributor's tax. Clearly, the plaintiffs were distributors according to the terms of the statute, because they were "corporations who sell gasoline in or from barrels, etc., not purchased from a licensed distributor of gasoline in this State."

The Court held that the law, as applied to this class of business, was an interference with interstate commerce. We respectfully call the attention of the Court to the fact that it is not shown in this case that the tank cars, barrels and packages, in the usual and ordinary course of plaintiffs' business, and, according to their custom, are shipped and consigned to the plaintiffs and actually delivered to the plaintiffs, and by plaintiffs, at the place of final destination of the same in the State of New Mexico, withdrawn from the carriers and held by the plaintiffs

as stock in trade, with absolute power of disposition, until the plaintiffs see fit to make sales thereof. What the usual and ordinary course of plaintiffs' business is, and what their usual custom is, is not stated. Evidently, in the usual and ordinary course of the plaintiffs' business, either the gasoline is sold to their customers before it is shipped from the States where purchased, or is sold by the plaintiffs while in transit or in course of transportation, and before it reaches its final destination in New Mexico and is actually delivered by the carriers. Evidently, the sales are made in the original packages and barrels while they are still in the hands of the carriers and before they have been withdrawn therefrom, or directly to purchasers from the State where they were bought. Certainly, the mere fact that the original barrels and packages remain unbroken in the hands of the plaintiffs would not protect or exempt the gasoline from taxation until the barrels and packages decay and rot from lapse of time, in the event they are not sold. That is not the meaning of the decision in this case. If it is, then it overturns every case cited in this brief, and is at variance with authority, as well as reason.

But, in this very case, the Court makes clear the fact that neither in it nor in the previous case of Standard Oil Co. v. Graves did it intend to completely repudiate the doctrine consistently and, without a single exception, adhered to for more than fifty years. The Court says:

> "In that case we reaffirm, what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from another State into his own State for sale in the original package, had a right to sell the same in such packages without being taxed for the privilege by *taxation of the sort here involved.*"

What had often been adjudicated heretofore in this Court? The doctrine, which the Chief Justice had said had never been questioned and had become the basis for the exertion of the taxing power in every State of the Union, had been heretofore

adjudicated. It had been adjudicated that coal in the original and unbroken boats and barges in which it was brought into the State was subject to taxation; it had been adjudicated that nails and staples in the original and unbroken kegs, and wire on the original and unbroken rolls, were subject to taxation; it had been adjudicated that coal in the original and unbroken cars in which it was brought into the State was subject to taxation; it had been adjudicated that logs, unbroken and unsawed, as they came into the State, were taxable; that coal in the same cars in which it was delivered had ceased to be an article of interstate commerce. The decision, we submit, does not turn on any change in the law relating to interstate commerce, *but to the "taxation of the sort here involved."*

But whether we are correct or not in this interpretation of the decision makes little difference, because the plaintiff in the case at bar is not doing the kind of business described above, and if it were, the law of this State does not apply to it. The law of this State does not touch the goods until they are in the hands of the purchaser or consignee in this State, and held as stock in trade at the place of their final destination for sale or use.

The kind of business involved in the case at bar is similar to the second class of business described in the decision in the Askren case, as follows:

> "That the gasoline shipped to the plaintiff from other States, as aforesaid, is in tank cars, and plaintiff, or plaintiffs, sell said gasoline from such tank cars, barrels and packages in such quantities as the purchaser requires."

As to this class of business, the Court says:

> *"Sales of the class last mentioned would be a subject of taxation within the legitimate power of the State."*

The statute of Alabama was down with the same complaint as the statute of Washington. It provided:

> "That any person, firm, association or corporation selling or offering for sale or exchange in this State any gasoline,

benzine, naphtha, or other liquid motor fuel must have tags, as hereinafter provided, attached to each tank car, tank barrel, can, or other container in which such gasoline, benzine, naphtha, or other liquid motor fuel is contained or marketed."

The tags were kept on hand by the State Highway Commission, and were sold to persons proposing to make sale of the oil and gasoline to persons in the State of Alabama. Under this law, a tax was imposed upon the goods mentioned which were sold in another State, delivered to a common carrier and consigned to a purchaser in the State of Alabama. Of course, it was an illegal interference with interstate commerce. Under it no oils or gasoline at all could be sold to any person in the State of Alabama, either in interstate commerce or in intrastate commerce, unless the tank cars, tank barrels, cans, or other containers were first tagged, and they could not be tagged until after the tax had been paid. The vendor of the gasoline was required, first, to purchase the tags and attach them to the tank cars, etc., before selling or offering to sell the same, either in interstate commerce or intrastate commerce.

The Law Is Not in Conflict With the Fourteenth Amendment.

Counsel for plaintiff in error, in the third portion of their brief and argument, contend that "the tax is unequal and contrary to the 14th amendment of the Constitution of the United States."

We have already discussed the contention that this tax is arbitrary or unequal, and have shown that the tax is imposed upon a certain class of dealers and upon a specific class of business activities or privileges, and that this classification is based upon rational distinctions between the classes taxed and those not taxed.

The tax in question does not violate the provisions of the 14th amendment. The Constitution of the United States contains no limitation upon the power of the States to impose excise, privilege or occupation taxes. The objects upon which these taxes may be imposed are matters for selection by the States.

It would seem that the right of the State to impose an excise tax upon oil "at some time intermediate the beginning of manufacture or production and the act of consumption," is as clear as is the right of Congress to impose a similar excise tax upon tobacco, liquor, drugs, oleomargarine, automobiles, or other luxuries or necessities.

In the case of McCray vs. United States, 195 U. S., 27, it was held that a tax of ten cents per pound upon oleomargarine, artificially colored, was an excise tax, the Court saying (p. 50), "that the acts in question on their face impose excise taxes which Congress has the power to levy, is so completely established as to require only statement."

In the case of Patton vs. Brady, 184 U. S., 609, the Court had under consideration the nature of the tax levied on tobacco by the War Ravenue Act of June 13, 1898. That Act provided for a tax of twelve cents per pound upon all tobacco and snuff, however prepared, manufactured and sold, or removed for consumption or sale. Holding that the tax was an excise rather than a direct tax upon the property, the Court said (p. 617):

> "Ever since the early part of the Civil War, there has been a body of legislation, gathered in the statutes under the title *internal revenue,* by which, upon goods intended for consumption, excises have been imposed in different forms at some time intermediate the beginning of manufacture or production and the act of consumption."

It appears that the tobacco upon which the excise tax was imposed, had passed from the hands of the manufacturer, but had not reached the consumer, and was, at the time of the passage of the Act, held and intended for sale.

In the case of Thomas vs. United States, 192 U. S., 363, it was held that a stamp tax on a memorandum or contract of sale of a certificate of stock, imposed by the Act of Congress of June 13, 1898, is not unconstitutional as a direct tax on the property which, under the Constitution, must be apportioned according to the census, but falls within the class of duties, imposts and excises which, by Section 8 and Clause 1 of Article 1 of the Con-

stitution, are required to be uniform throughout the United States.

The Law Is Not in Violation of the State Constitution.

Lastly, it is claimed by the plaintiff in error that the tax in question violates Article 7, Section 2, of the Constitution of the State of Georgia, which provides:

> "All taxes shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The tax is not an ad valorem tax, nor is it a tax upon property. It is imposed upon the business of a certain class of dealers in oil and gasoline in this State. Such dealers find themselves in possession of oil and gasoline which have not been inspected and upon which no tax has been paid. The property is in the State and is subject to the laws of the State, like all other property. Under the law, the same may not be sold or offered for sale or stored. By paying the tax in question, which includes partly the cost of inspection and partly a tax for revenue, these dealers are given the privilege of selling, offering for sale and storing said products. The tax, therefore, is a tax upon the business and the privilege of selling, offering for sale and storing uninspected oil and gasoline.

Before the tax is paid and the inspection is made, the oil and gasoline are not salable, but the privilege is granted to the dealers in such goods upon the payment of the tax to sell and store the same. Such a tax is not a tax upon property. While the occasion of the tax is property and its burden falls upon property, and, for many purposes, the property might be said to be taxed, the tax on property referred to in the Constitution of this State is a tax imposed on the ownership of property. In Johnson vs. Mayor, 62 Ga., 646, "taxes thus levied" for each and every one-horse wagon, one-horse dray or one-horse express wagon hauling in the city, twenty-five dollars; for each two-horse wagon, fifty dollars," and similar impositions, were held

not on property but on business, and not in conflict with the Constitution. A similar ruling was made in Davis vs. Mayor, 64 Ga., 128.

In the leading case of Atlanta Association vs. Stewart, 109 Ga., 80, on page 87, while dealing with a State tax of "one dollar for each telephone station or box," the Court said:

> "Can this be claimed to be a tax on property? There is not the slightest hint that the value of the box or station has any connection with the tax. For a station or box worth twenty-five dollars, the company would pay one dollar; for another costing or worth a thousand dollars, it would pay exactly the same. No effort is made to ascertain value, or to deal with property as to its value. The company might have a building and real estate worth a million of dollars, and furniture and other property worth ten thousand dollars, or it might have no property and operate with rented property, but this clause has no reference at all to property and would be the same in either case. It simply refers to the number of stations or boxes rented or used. A tax on a person, graduated according to the number of a certain kind of articles, apparatus, or machines employed by him, or it, without regard to value, is without question not a property tax but an occupation tax."

The tax is similar to the excise tax imposed by the United States upon the sale of tobacco which was upheld in the case of Patton vs. Brady, 184 U. S., 608, and in the case of Thomas vs. United States, 192 U. S., 363, in which it was held that a stamp tax on contracts falls within the class of duties and excises, and is not a tax upon property.

In the case of Martin vs. Pollock, 144 Ga., 608, it was held that an inheritance tax is not a tax on property, but is a tax on the privilege of receiving property by inheritance. See also Farkas vs. Smith, 147 Ga., 503.

In the case of Mayor vs. Cooper, 131 Ga., 673, it is said:

> "The same ruling is repeated in Kehrer vs. Stewart, 197 U. S., 60. The statement in the last cited case 'that a tax on

the privilege of selling goods is, in effect, a tax on the goods themselves,' does not, of course, mean that such a tax is a tax on property within the contemplation of the clause of the Constitution requiring all property to be taxed ad valorem."

On this subject, the court below, in its opinion, very aptly said:

> "It (the tax) more resembles excises commonly laid by the United States upon articles and transactions, evidenced by stamps or brands affixed to the articles. Perhaps it is best described by the term 'privilege tax,' used by the Supreme Court, on the similar inspection fees in the Graves case. The legislature, by reason of the danger of oils whose qualities are uncertain, might have prohibited the storage or sale of them, and certainly could unless they be inspected. The privilege of storage and sale after inspection, is what the tax is for. But it is unnecessary to name it, if it be not a property tax."

The other provision of the article quoted, to-wit: "Taxation shall be uniform on the same class of subjects," is not offended by the tax in question. It has often been held by the Supreme Court of Georgia that the legislature has the power to classify subjects of taxation. The only limitation upon this power is that the classification must not be arbitrary, but must be made upon a reasonable basis. See the case of Mayor vs. Cooper, above cited, and the case of Mutual Reserve Association vs. Augusta, 109 Ga., 73.

In this case, the classification is not arbitrary, but is based upon reason. The initial dealers alone handle uninspected oil and gasoline. For the most part, they are wholesale dealers. Certainly, the legislature had the right to assume that they should be classed as wholesale dealers. They are alone responsible for the condition of the gasoline dealt in in the State. Their business is clearly distinguishable from the business of other dealers in the State. The latter have nothing to do with the production or manufacture or refining of these products.

The fact that the initial dealers in oil and gasoline happen to be importers, makes not the slightest difference, because it is not the importation of oil and gasoline that is taxed. The law applies to all uninspected oil and gasoline, regardless of whether they are taken from wells in this State or other States, or are refined in this State or some other State, or were manufactured in this State or some other State. The classification, therefore, of the business of persons engaged in the handling of such products, and enjoying the privilege of selling, offering for sale and storing such products, is a natural and reasonable classification.

See, in this connection, the following cases: City of Rome vs. McWilliams, 52 Ga., 251; Mutual Reserve Association vs. Augusta, 109 Ga., 73; Sawtell vs. Atlanta 138 Ga. 687; Savannah vs. Cooper, 131 Ga., 670; Carroll vs. Wright, 131 Ga., 728.

On this subject, the court below very aptly remarked:

> "The peculiarities of oils and the handling thereof are such as to make them reasonably a subject of classification. Since the law requires the inspector to travel as much as thirty miles to inspect, expenses and mileage being paid by the State (Civil Code, Section 1806), it is evident that inspection of the smaller lots of oil might be at a loss. There is thus reason for the sub-classification as to a quantity with a higher fee for smaller lots; Sawtell vs. Atlanta, 138 Ga., 687; Farkas vs. Smith, 147 Ga., 503. The Georgia Constitution forbids no form or mode of taxation generally permissible, but only requires specified uniformities."

It is said that the law begins to operate upon the goods immediately upon their reaching their destination in this State. It, in fact, begins to operate upon the goods only after they have reached their destination in this State, and after their interstate transportation has ended, and they are in the hands of the purchaser, owner, or consignee, and are being held by him in storage awaiting orders or for sale after breaking the original packages. In other words, the law operates upon the goods precisely in the same way that all laws operate upon intrastate goods. Such goods are always held and disposed of and used

subject to the laws of the State, and not otherwise. There must be a time when the goods cease to be interstate, and there must, likewise, be a time when the law begins to operate. We have shown that this period of time is not after the first sale of the goods. If so, it may never begin to operate, for the goods may never be sold, but may remain in the hands of the owners, enjoying all the protection of the laws of the State. There is only one time when the law begins to operate, and that is when the goods cease to be articles of interstate commerce. There is no other period of time which can be fixed.

We most respectfully insist that the judgment of the court below should be affirmed.

Respectfully submitted,

ALBERT HOWELL, JR.,
MARK BOLDING,
P. H. BREWSTER,
ARTHUR HEYMAN,
Attorneys for Defendants in Error.

Office Supreme Court,
FILED
SEP 16 192
JAMES D. MA

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1920.

No. 496 126

THE TEXAS COMPANY,
Plaintiff in Error.

vs.

J. J. BROWN, *et al.*,
Defendants in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR

JAMES L. NESBITT,
of New York City
LUTHER Z. ROSSER,
JOHN M. SLATON,
BENJ. Z. PHILLIPS,
STILES HOPKINS,
of Atlanta Ga.
Attorneys for Plaintiff in Error

Johnson-Dallis Co., Printers, Atlanta, Ga.

TABLE OF CONTENTS.

	Pages
Reply Brief and Argument	1-19
Corrections	1-4
The Vital Law Attacked	4-7
Separability	7-13
Legislation of Georgia Construed: Inspection Fees not to be Occupation Taxes	13-14
Dawson, Atty. Gen., vs. Kentucky Distilleries & Warehouse Company	14-15
Bowman, Atty. Gen., vs. Continental Oil Company	15-17
Classification	17-19
Supplement, Act 394 of August 10th, 1921, Georgia Legislature	19-21

TABLE OF CASES.

	Page
Baldwin vs. Franks, 120 U. S. 679	10
Bohlinger Adv. Cella Com. Co., 147 Fed. 419	9
Bowman, Atty. Gen., vs. Continental Oil Co., 252 U. S. 444	15
Bowman, Atty. Gen., vs. Continental Oil Co., 41 S. C. R. (June 6, 1921, No. 17) 606	6-16
Brown Adv. Texas Company, 266 Fed. 577	3
Cella Commission Co. Adv. Bohlinger, 147 Fed. 419	9
Commissioners vs. Rollins, 132 U. S. 662	8
Continental Oil Co. Adv. Bowman, Atty. Gen., 252 U. S. 444	15
Continental Oil Co. Adv. Bowman, Atty. Gen., 41 S. C. R. (June 6, 1921, No. 17) 606	6-16
Dawson, Atty. Gen., Kentucky Co., 41 S. C. R. (April 1, 1921, No. 11) 272	14
Farmers Loan & Trust Co. Adv. Pollock, 158 U. S. 601	11
Foote & Co. vs. Maryland, 232 U. S. 494	19
Franks Adv. Baldwin, 120 U. S. 679	10
Graves vs. Standard Oil Co., 249 U. S. 389	19
Harris Adv. United States, 106 U. S. 629	10
Hays Adv. Herman, 236 U. S. 178	15
Herman vs. Hays, 236 U. S. 178	15

Pages

Kentucky Dist. & W. Co. Adv. Dawson, Atty. Gen., 41 S. C. R. (April 1, 1921, No. 11) 272..... 14

Maryland Adv. Foote & Co., 232 U. S. 494..... 19

Minnesota Adv. Pure Oil Co., 248 U. S. 158..... 19

North Carolina Adv. Red C. Oil Co., 222 U. S. 380... 19

Pollock vs. Farmers L. & T. Co., 158 U. S. 601..... 11

Pure Oil Co. vs. Minnesota, 248 U. S. 158..... 19

Red C. Oil Co. vs. North Carolina, 222 U. S. 380..... 19

Reese Adv. United States, 92 U. S. 214..... 11

Rollins Adv. Commissioners, 130 U. S. 662..... 8

Smith Adv. Wofford Oil Co., 263 Fed. 396..... 1

Sprague vs. Thompson, 118 U. S. 90..... 11

Standard Oil Co. vs. Graves, 249 U. S. 389..... 19

Texas Company vs. Brown, 266 Fed. 577..... 3

Thompson Adv. Sprague, 118 U. S. 90..... 11

United States vs. Harris, 106 U. S. 629..... 10

United States vs. Reese, 92 U. S. 214..... 11

Wofford Oil Co. vs. Smith, 263 Fed. 396..... 1

In The
Supreme Court of the United States

October Term, 1920

No. 496

The Texas Co.,
Plaintiff in Error

vs.

J. J. Brown, et. al.,
Defendants in Error

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Typographical Error in Record.

On page 7 of the Record, the section of the Georgia Code is printed as 1919 when the correct section number is 1809.

Corrections.

In our original brief we referred to the case of *Wofford Oil Co. vs. Smith*, Attorney General of the State of Alabama, involving the identical questions in oil inspection laws from a Federal standpoint, as the instant case (263 Federal Reporter 396). Three Judges, including Circuit Judge Walker, who dissented in the instant case, held the Alabama Statute void in its entirety, for the same reasons we are urging

against the Georgia law. The separation into Constitutional and unconstitutional divisions was considered, but the whole law was declared void.

We stated in our brief that the case had been appealed to the Supreme Court of the United States, which is correct, and it was docketed as J. Q. Smith, Atty. General, etc. vs. Wofford Oil Company, No. 310, October Term, 1920.

Since the Alabama statute was held unconstitutional, the Alabama legislature has met and apparently acquiesced in the decision by passing a new Oil Inspection law, (General and Local Acts Alabama—Special Session 1920, pages 117-121)—in view of the attack on the old law based on the excessiveness of the inspection fee. The material portion of the new Alabama law on the subject is as follows:

> "Section 9. That an inspection fee of 1/20 (one-twentieth) of one cent (1c) for each gallon of gasoline, benzine, naptha or other liquid motor fuel sold or offered for sale in the State of Alabama, shall be paid to the State of Alabama by the person, firm, corporation or association who first offers in the State of Alabama said gasoline, benzine, naptha or other liquid motor fuel for sale. Said inspection fee shall be paid into the State Treasury on or before the 10th day of each month on all of said products so sold during the preceding month, etc."

Presumably the fee of 1/20 of one cent per gallon will about cover the cost of inspection. In Georgia the minimum fee is ten times as great, being *now* like the old Alabama law *was* when it imposed an inspection fee of ½ (one-half) a cent a gallon. In Georgia where the quantity inspected is less than two hundred gallons, the inspection fee runs up to 1½ cents per gallon or thirty times the charge in Alabama.

The new Alabama statute squarely meets the proposition and places the inspection fee *as such only* upon the person

who *first offers for sale* the gasoline, etc., who necessarily is the only one who must pay it, provided the fee is reasonably proportionate to the cost of inspection.

We understand the Alabama case now pending in the Supreme Court of the United States has been dismissed. The instant case is reported in 266 Federal Reporter 577 as The Texas Company vs. Brown, Commissioner of Agriculture, et al.

On pages 16 and 17 of our original brief, we said that if the inspection fees constituted an occupation tax in Georgia, it was the only instance where a double occupation tax was charged.

Of course we used occupation tax in the sense of a tax imposed for the exercise of the corporate privilege of doing business. Certainly an extra license tax is charged upon the business of auctioneers, pawnbrokers, circuses, etc., but the absence of oil inspection fees from the all-comprehensive list of such business, is persuasive argument that they were not construed as occupation or license taxes, but as inspection fees, solely.

We respectfully urge that our statement (Brief page 3) is correct that all legislation on the subject of oil inspection now existent in Georgia is constituted by amendments to the acts of 1870 page 398 and 1880 page 152. The caption of the act of 1890 referred to by defendants in error on their brief, page 3, as the origin of this legislation, reads as follows:

"No. 259

"An Act *to amend* the laws of this State in reference to the inspection of illuminating oils, providing for the appointment of inspectors of oil; prescribing the manner and amount of their compensation; revising the schedule of fees now prescribed by law for the inspec-

tion of oils; providing for the disposition of fees and for other purposes." (The italics are ours).

THE VITAL LAW ATTACKED.

The defendants in error recite on page 4 of their brief, Code Section 1809 as the material portion of the law. This section refers to the flashing point of petroleum products.

We respectfully submit that in view of the excessive fees, the material and vital section of the law that violates most flagrantly our Constitutional rights is section 642 of the Criminal Code, reading as follows:

> "Section 642. Sale of Uninspected Oil. If any person shall sell, or keep for sale, or in storage, any crude or unrefined petroleum, naptha, kerosene, earth-rock, coal, machine or illuminating oil, the products of petroleum, earth-rock, or coal oil, without having the same inspected and approved, by an authorized inspector, he shall be guilty of a misdemeanor."

In Georgia, a person includes a corporation. Section five of Code of 1910.

The above section is a codification of the oil inspection laws and is part of the legislation on the subject, constituting an integer.

In view of the clear and unambiguous language in the above section of the Criminal Code, it is difficult to see how defendants in error can insist (Brief of Defendants in Error page 29) "that there is not a single provision in the Statute, which by its terms or by necessary implication, requires that the oil and gasoline so sold, shipped and delivered directly to purchasers, be inspected, and the fees paid, while the same is in the hands of the plaintiff, or before it has been delivered to the purchasers, as was the case in the Washing-

ton and North Dakota and Alabama cases. To construe the law otherwise would be unconstitutional."

The cases cited from Washington, North Dakota and Alabama are indistinguishable from this. Here, by criminal code Section 642, the Texas Company cannot sell or keep for sale, or in storage, petroleum products without inspection. In conformity with its requirements, The Texas Company has for years paid the fees before delivery of the product. It is not to be presumed this was done voluntarily. The names of the consignees, the numbers of cars in which delivered, and the dates of payment of inspection fees are given. In fact, these fees are paid where apparently the consignee is to use the gasoline itself, since the Yaryan Rosin and Turpentine Company is not a dealer in petroleum products but uses them to extract rosin and turpentine. (See record page 58). The law of 1913 (pages XVI and XVII of appendix to original brief) in terms amending prior oil inspection laws, specifically provides that

> "Where such commodities or any of them may be purchased within the State or *without the State* and brought into the State, by any person, firm or corporation, *not for the purpose of selling or offering the same for sale, but for the use or consumption by the purchaser in manufacturing or other lawful uses, either as fuel or otherwise, the inspections herein provided shall be made, and the fees above fixed shall be paid therefor.* Except that no such purchaser shall be required to pay more than twelve hundred dollars per year for all such commodities used or consumed by him as aforesaid and such payments may in the discretion of the Commissioner of Agriculture, be divided into equal monthly payments of $100 each." (Italics ours).

Even where The Texas Company shipped gasoline directly to the City of Vienna, Ga., for its own use, it was compelled to pay the inspection fee. (Record, page 59).

So, the law, both civil and criminal, in terms demanded that The Texas Company should pay the inspection fees before the gasoline or oil came to rest in the State, and the conduct of its business for years was simply a practical construction by the State and The Texas Company of the meaning of a law so clear that it could not be tortured into any other construction. The Defendants in Error do not attempt to deny a single payment, set out by The Texas Company with the utmost particularity of detail.

How can the Defendants in Error say (Defendant's brief, page 8):

> "When said products are shipped directly to purchasers, defendants have never required or demanded and have no intention of requiring or demanding that the same be inspected or fees paid, before actual delivery to such purchaser for sale or storage. Where oil and gasoline in said tank cars or other original receptacles have been inspected, such inspections have been made solely because the plaintiff requested that same be made at said time and place, and solely for convenience of plaintiff."

It is pertinent to quote from the U. S. Supreme Court's decision in *Bowman, Atty. Gen'l. of State of New Mexico, et al. vs. The Continental Oil Co.*, decided June 6th, 1921, Supreme Court Reporter, Vol. 41, No. 17, p. 606:

> "Its (the Constitutional Oil Co.) executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce, *unless it be enforced*

otherwise than as prescribed by the statute; that is to say, without authority of law, hence it cannot be enforced at all." (Italics ours).

Such action on the part of the Defendants in Error would be a disregard of the criminal statute, Code Sec. 642, and of the spirit and language of the oil inspection laws. For instance, see the first sentence of the Act of 1913 amending the other acts. (Plaintiff's Brief, appendix page XVII):

> "The provisions of this Act shall apply not only to gasoline, benzine and napthas *sold or offered for sale in the State of Georgia*, but likewise to all such commodities *that may be sold elsewhere* and brought into the State for consumption or use." (Italics ours).

Therefore the Legislature provided for inspection of oils, gasolines, etc., before "selling, offering for sale, or holding in storage" the same, but it thought that petroleum products bought elsewhere and brought into the State for consumption and not sale by the buyer, might escape inspection and inspection fees, and hence passed this Act, limiting, however, the maximum annual fees to the Georgia citizens to twelve hundred dollars.

The price at which The Texas Company sold the oil to consignees of tank cars shipped from other States depended on whether the consignee or it paid the inspection fees, and it paid the fees in a large proportion of cases. (Record, page 24).

SEPARABILITY.

We respectfully submit the Georgia laws cannot be construed as partly Constitutional and partly unconstitutional. The purpose of the laws is to protect the people of this State from the introduction of oils and gasolines falling below certain standards. The history and verbiage of the acts sc

show, and if there were any doubt, it is dissolved by the Act of 1913, (Appendix pages XVI and XVII) which amends prior acts and provides that even persons buying oil or gasoline outside of the State and bringing it *into the State for their own use*, shall have the same inspected and pay the inspection fees.

Surely, no one can contend that the private use of a commodity can constitute a business on which an occupation or privilege tax as distinguished from an excise tax, can be levied. A householder using coal or wood or meat cannot be burdened with such a tax. It can only be supposed that the Legislature meant that it exercised its police power in requiring inspection in protection of the citizen and not in its taxing power to collect revenue. Certainly the dominant motive must have been the protection of the citizen.

In *Board of County Commissioners vs. Rollins*, 130 U. S. 662-670, this court said:

> "To get at the thought or meaning expressed in a Statute, a contract or a Constitution, the first resort in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. *Newell vs. People*, 7 N. Y. 97. *Hills vs. Chicago*, 60 Ill. 86, *Dew vs. Reed*, 35 U. S. 10 Pet. 524; *Leonard vs. Wiseman*, 31 Md. 204; *People vs. Potter*, 47 N. Y. 375; Cooley Const. Limitations, 57; Story on Constitution 400; 76 Ill. 34."

In the instant case not only is the language clear, but the intent is manifested by practical construction in the collec-

tion of fees set out with the utmost particularity (Record, pages 52-63). Indeed the lower court unanimously found a violation by defendants of the Constitutional rights of the plaintiff in certain particulars and granted an injunction against them as to such actions.

However, the majority of the Special Tribunal found that the law was separable by allowing oils and gasolines sold or intended to be sold in original containers to enter the State free from inspection, but brought under the inspection law other petroleum products not coming within the above class.

We respectfully submit that by so holding the Court defeated the prime purpose of the inspection laws which was to protect the entrance and use even for the private consumer, of uninspected petroleum products, which the State could do, provided the inspection fees were proportioned to the expense of inspection. In doing so, the Court determined that the Legislature would have passed the all including acts on the subject, even if some of the products would, for Constitutional reasons, escape inspection. In so ruling, we respectfully urge that the Court under the guise of construction, passed into the domain of legislation.

Judge Sanborn, speaking for the Circuit Court of Appeals of the 8th Circuit, said in *Cella Commission Co. vs. Bohlinger*, 147 Fed. 419:

> "But there are two indispensable conditions of such a result, that the Constitutional and unconstitutional parts are capable of separation, so that each may be read and may stand by itself *(Baldwin vs. Franks*, 120 U. S., 679, 685, 686,) and that the unconstitutional part is not so connected with the general scope of the law as to make it impossible if it is stricken out, to give effect to the apparent intention of the Legislature in enacting it. (Citing numerous cases from the U. S. Supreme Court)."

If a statute in terms excluded all lepers from a State, could

a court hold it separable on the theory that the Constitution forbade the exclusion of many lepers and therefore the law could be enforced as to a few? Or would the Court hold the whole law void on the theory that the Court could not tell whether the Legislature would have passed the Act unless it could efficiently prevent the evil denounced?

In *Baldwin vs. Franks*, 120 U. S. 679, the Court had under consideration Section 5519 of the Revised Statutes which provided for the punishment of persons who should conspire for the purpose of directly or indirectly depriving any person or class of persons of the equal protection of the laws. The Court had held in *United States vs. Harris*, 106 U. S. 629, that this section was unconstitutional as to conspiracies of the character mentioned, within a State. In the *Baldwin* case, the conspiracy was directed against Sing Lee and others, subjects of the Emperor of China, who claimed protection under a treaty between the United States and China. It was claimed that although the Statute was void as to a conspiracy by persons in a State against a citizen of the United States, the statute was valid, nevertheless, for the purpose of protecting aliens under treaty rights.

Chief Justice Waite in replying to this argument said:

> "It (the Statute) provides in general terms for the punishment of all who conspire for the purpose of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens—those who conspire to deprive him of his rights under the Constitution, laws or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough.

To the same effect is the decision in *United States vs.*

Reese, 92 U. S. 214, where the court had under consideration an indictment against alleged conspirators at a Kentucky Municipal election. To the extent that the law was directed against electors on account of race, color or previous condition of servitude, it was a lawful exercise of Congressional power, but the language comprehended interference for reasons beyond the power of Congress to enact. In the case under consideration, the elector was a negro.

On the question of separability the Court said:

> "We are therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the Constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. . . . The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

The question is answered in the negative, the court saying:

> "To limit this Statute in the manner now asked for, would be to make a new law, not to enforce an old one. This is no part of our duty."

This court deals with the same subject in the same way in *Pollock vs. Farmers Loan & Trust Co.*, 158 U. S. 601, quoting from *Sprague vs. Thompson*, 118 U. S. 90:

"The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia, the Statute is made to enact what confessedly the Legislature never meant. It confers upon the Statute a positive operation beyond what anyone can say it would have enacted in view of the illegality of the exceptions."

In the instant case the Penal law provides for punishment as follows:

"If any person shall sell, or keep for sale, or in storage, without having the same inspected and approved by an authorized inspector, etc."

And the amendatory act of 1913 says:

"The provisions of this Act shall apply not only to gasoline, benzine and napthas sold or offered for sale in the State of Georgia, but likewise *to all such commodities that may be sold elsewhere and brought into the State of Georgia for consumption* or use."

How then by construction can the court say as to legislation that is dominated by the idea of having only inspected oil to enter the State, that some oil may be inspected, but other oil because of Constitutional prohibitions shall be relieved?

We respectfully suggest that all this element of controversy arises from not construing the law as did the Special Tribunal in the case of *Wofford Oil Co. vs. Smith,* Atty. General of Alabama, and as Circuit Judge Walker did, in his dissenting opinion in the instant case, as a case involving only inspection in the exercise of police power, where the charge for inspection must approximate the cost thereof.

THE LEGISLATURE OF GEORGIA IN 1921 CONSTRUED INSPECTION FEES NOT TO BE OCCUPATION TAXES.

We submit that the last act of the Georgia Legislature, approved by the Governor on August 10th, 1921, conclusively interprets the inspection laws of Georgia as being inspection laws and not laws imposing occupation or privilege taxes.

The legislation of 1921 is absolutely inconsistent with the idea that the inspection laws attacked in the proceedings now pending before the Federal Supreme Court impose an occupation tax.

By the act of August 10, 1921, the Legislature of Georgia specifically provides "for an occupation tax upon all distributors selling fuels in this State, requiring all distributors therein to register and make returns, providing penalties, etc."

A copy of this act is printed as an appendix to this reply brief.

It will be observed that the act of August 10, 1921, does not in any wise attempt to repeal or affect the inspection laws, and therefore the legislation interpreted the inspection laws as intended for the protection of the people in regard to their safety and quality of kerosene and gasoline, and not intended for purposes of revenue.

It is incredible that the Legislature intended two occupation taxes to be imposed for the identical act and business, if the inspection laws are construed to impose occupation taxes, as interpreted by the majority of the Special Tribunal.

It is also to be observed that the act of 1921 endeavors to avoid the discrimination against interstate commerce contained in the inspection laws by providing (Sec. 2) that *every* distributor who sells fuels in this State (except those

importing and selling it in the original packages in which it is brought into the State) shall pay an occupation tax of one cent per gallon upon every gallon of such fuel sold." (Italics ours).

The attempt is manifest to provide the equality of the New Mexico laws, approved by the Federal Supreme Court, in *Askren Atty. Genl. vs. Continental Oil Co.*, and *Bowman, Atty. Genl. vs. Continental Oil Co.*, supra, and impliedly recognizes that such a law, unless viewed as an inspection law in the exercise of police power, cannot be sustained as an occupation tax, if imposed *only* on the importer.

DAWSON, ATTORNEY GENERAL OF KENTUCKY vs. KENTUCKY DISTILLERIES & WAREHOUSE CO.

Since the preparation of our original brief, the above stated case has been decided by the U. S. Supreme Court, reported in the Supreme Court Reporter of April 1st, 1921, Vol. 41, No. 11, page 272.

In that case a law of Kentucky imposing an "annual license tax" of 50 cents a gallon upon all whiskey either withdrawn from bond or transferred in bond from Kentucky to a point outside that State was a tax on property and void under the Kentucky Constitution, because "it was not uniform upon all property of the same class subject to taxation." This is similar to the provision in the Georgia Constitution.

In that case, the Supreme Court of Kentucky had not construed the Statute, and so in Georgia, the Supreme Court has not construed the oil inspection laws.

If this court holds the Georgia inspection laws impose a privilege or occupation tax, the analogy between the Dawson case and the instant case is striking. In Georgia, the storage or sale of one gallon of uninspected oil is a penal offense, and yet one transaction would not constitute engaging in business.

Likewise, the imposition of the inspection charge is not upon the business of owning, storing or selling the oil. The fee would be imposed although the storage had not been for any appreciable time.

Paraphrasing the decision in the Dawson case, the excessive inspection fee is imposed upon the Texas Company as a condition upon its "making the only use of its products of which it is capable, i. e. consumption, sale or keeping for future consumption or sale." The whole value of the oil or gasoline depends upon its owners' right to dispose of it and to tax the right is to tax the value. To lay a tax by reason of the ownership of property is to tax the property.

Holding the tax in the Dawson case to be one on property, the U. S. Supreme Court did not find it necessary to consider whether it was obnoxious to the Commerce clause of Federal Constitution, but cited the case of *Herman vs. Hays*, 236 U. S. 178.

In that case, the Supreme Court said: "The protection against imposition by the State of direct burdens upon the right to do interstate Commerce is practical and substantial, and embraces those acts which are necessary to the complete enjoyment of the right protected."

In the instant case, The Texas Company cannot transact interstate business, nor sell, nor store its product in the State without payment of an excessive inspection fee, which is not imposed upon anybody but the importer.

HARRY S. BOWMAN, ATTY. GENL. STATE OF NEW MEXICO vs. THE CONTINENTAL OIL COMPANY.

Mr. Bowman succeeded Mr. Askren as attorney general and was substituted for him.

The decision by the Federal Supreme Court, (252 U. S. 444) on the preliminary injunction seemed to have influenced the majority of the three judges in reaching their opinion in the instant case, but we thought Circuit Judge

Walker was correct in holding it inapplicable. Since the preparation and publication of our original brief, the U. S. Supreme Court has rendered a decision in the case on final decree, the decision being handed down on June 6th, 1921. Supreme Court Reporter, Vol. 41, No. 17, page 606.

As we said in our original brief, that case bears in our judgment little relation to the Texas Oil Co. case, excepting that the intimations are favorable to it.

In the Bowman case, the license fee of $50.00 imposed on each distributing station or place of business was held void, because inseparable as to interstate and intra-state commerce. The annual license fee was payable in advance on penalty of fine or imprisonment. The Court said: "The subject taxed is not in its nature divisible as in the case of the excise tax."

In the Texas Oil Co. case, the excessive inspection fee was payable in advance on penalty of fine or imprisonment or both, and was intended to prevent the consumption, storage or sale in Georgia of uninspected oil. In its nature, it is indivisible, because it cannot be assumed the State contemplated divisibility in the passage of a law protecting its people against dangerous or defective oil and gasoline. Were the dominant purpose to collect revenue, then it might be assumed the State would make the division and collect the money derivable from the fund, in so far as the Constitution would permit.

In the Askren case, the excise law was purely a revenue measure.

The U. S. Supreme Court in the Bowman case said: "And since the tax operates impartially upon all, and with territorial uniformity throughout the State, we deem it equal and uniform upon subjects of taxation of the same class within the meaning of section 1 of Article VIII."

In the Texas Oil case the excessive inspection fee does not

operate impartially because it only falls on the one *first* bringing the oil or gasoline into the State, and the burden is less on the one bringing it into the State for his own consumption provided he consumes a quantity sufficient to make the inspection fees equal $1200. per annum when he is relieved of all excess beyond that sum.

A man consuming 240,000 gallons of gasoline and one consuming 1,000,000 gallons would pay the same and the doctrine of uniformity would be violated if the oil laws be construed as imposing taxes instead of providing for inspection, (See 62 Ga. 645, original brief, page 70) for which we contend.

All of these conditions show that the Oil Inspection Laws of Georgia were passed solely in the exercise of the State's police power to protect its citizens from dangerous or defective oil, and they come under the condemnation of numerous decisions of the U. S. Supreme Court, because the fees for inspection were grossly in excess of the cost.

It will be observed that in the Askren case decided June 6, 1921, the Supreme Court does not advert to the Oil Inspection cases, presumably because they bore no relation to the case decided.

CLASSIFICATION.

On page 52 of brief of Defendants in Error, they say:

> "The tax is not an advalorem tax, nor is it a tax upon property. It is imposed upon the business of a certain class of dealers in oil and gasoline in the State. Such dealers find themselves in possession of oil and gasoline which have not been inspected and upon which no tax has been paid. The property is in the State and is subject to the laws of the State, like all other property. Under the law, the same may not be sold or offered for sale or stored. By paying the tax in question, which in-

cludes partly the cost of inspection and partly a tax for revenue, these dealers are given the privilege of selling, offering for sale and storing said products. The tax, therefore, is a tax upon the business and the privilege of selling, offering for sale and storing uninspected oil and gasoline.

"Before the tax is paid and the inspection is made, the oil and gasoline are not salable, but the privilege is granted to the dealers in such goods upon the payment of the tax to sell and store the same."

The defendants in error might have further said, that until the payment of the exorbitant charge, the oil and gasoline could not even be stored for personal consumption by the person bringing them into the State of Georgia for such personal use. (Acts 1913 Rec. XVI-XVII).

However, the above statement in our opponent's brief aids in making clear the issue between us.

The tax is not a "tax upon the business and the privilege of selling, offering for sale and storing uninspected oil and gasoline," as their brief says, because uninspected oil and gasoline are *never* allowed to be sold, offered for sale or stored. If the inspection fee be paid, and the oil or gasoline be *not* inspected, it then cannot be sold, stored or offered for sale.

There is no such thing as imposing an occupation tax on the privilege of having one's oil inspected, to which position we respectfully suggest, the defendants in error are driven.

Indeed, to sustain a part of the law, if sustainable, they must sustain the occupation tax as one placed upon the privilege of having one's oil inspected when that oil is intended for his own personal use.

In addition, the foregoing excerpt from the brief of de-

fendants in error insists on a classification based on a distinction between the first seller and any subsequent seller of oil, when the first seller must be the importer from another State, and as we understand the decisions of this Court, when such intention is manifest, and the law is discriminative, it necessarily is void.

We conclude by urging that the doctrine laid down in the cases of *Red C. Oil Co. vs. North Carolina*, 222 U. S. 380; *Foote & Co. vs. Maryland*, 232 U. S. 494; *Pure Oil Co. vs. Minnesota*, 248 U. S. 158, and *Standard Oil Co. vs. Graves*, 249 U. S. 389, is the only one that preserves and protects the Constitutional rights of the citizen, both under the Federal and State Constitutions.

From the application of these decisions, all confusion is avoided, and free commercial intercourse is maintained between the peoples of different states without prohibitive or burdensome and discriminatory laws.

Respectfully submitted,

JAMES L. NESBITT,
of New York City,

LUTHER Z. ROSSER,
JOHN M. SLATON,
BENJ. Z. PHILLIPS,
STILES HOPKINS,
of Atlanta, Ga.,
Counsel for Plaintiff in Error.

HOUSE BILL NO. 394 AS PASSED BY THE GENERAL ASSEMBLY AND APPROVED BY THE GOVERNOR, AUGUST 10, 1921.

AN ACT

Providing for an occupation tax upon all distributors selling fuels in this State, requiring all distributors therein to

register and make returns, providing penalties for violations of this Act, and for other purposes.

SECTION 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that the terms used in this Act shall be construed as follows:

"Distributor" shall include any person, association of persons, firm or corporation, whether resident or located, who imports or causes to be imported, fuels as herein defined, into the State; and also any person, association of persons, firm, or corporation, who produces, refines, manufactures or compounds fuels as herein defined, within the State.

"Fuels" shall include gasoline, benzol, naptha, and other motor fuels commonly used in internal combustion engines. Provided that nothing contained in this section or in this Act shall apply to kerosene oil.

SECTION 2. Be it further enacted by the authority aforesaid, that every distributor who sells fuels in this State (except those importing and selling it in the original packages in which it is brought into the State) shall pay an occupation tax of One Cent per gallon upon every gallon of such fuel sold.

SECTION 3. Be it further enacted by the authority aforesaid, that every such distributor shall register with the Ordinary of each County in which he or they may be engaged in selling fuels, on or before September 1st, 1921, and on the same day of the same month of each succeeding year, giving his place of business and post office address, in a well-bound book to be kept for that purpose by the Ordinary of each County.

SECTION 4. Be it further enacted by the authority aforesaid, that such distributor shall keep and preserve all invoices and bills of fuels sold for the period of one year, and submit the same to the Comptroller General of the State, whenever required by him.

SECTION 5. Be it further enacted by the authority aforesaid, that all distributors of fuels in this State shall make quarterly returns to the Comptroller General of all fuels sold by them to others and of all fuels sold by such distributors at their service stations. The first of said returns shall be made on October 1st, 1921, and embrace the period between the date of this Act and said date, and quarterly thereafter.

SECTION 6. Be it further enacted by the authority aforesaid, that every distributor selling fuels as aforesaid, shall make returns to the Comptroller General on October 1st, 1921, and quarterly thereafter, of the number of gallons of fuels sold, which shall be sworn to before an officer of this State authorized to administer oaths; and shall make the first payment of said tax on October 1st, 1921, and quarterly thereafter.

SECTION 7. Be it further enacted by the authority aforesaid, that any distributor who shall fail to register, to make the returns aforesaid, to pay the said tax when due, or fail to do any other act in this Act required, shall be guilty of a misdemeanor, and punished as provided in Section 1065 of the Penal Code.

SECTION 8. Be it further enacted by the authority aforesaid, that all laws and parts of laws in conflict with this Act are hereby repealed.

TEXAS COMPANY *v.* BROWN, INDIVIDUALLY AND AS COMMISSIONER OF AGRICULTURE OF GEORGIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 126. Argued October 13, 14, 1921.—Decided April 17, 1922.

1. The Georgia laws, (Civil Code §§ 1800-1814 as amended; Penal Code §§ 639, 642) providing for inspection of oil and gasoline and collection of inspection fees, are to be construed as remaining applicable to products stored within the State or sold in internal commerce, even if invalid as applied to interstate commerce, in view of the declaration to that effect in the Act of August 17, 1920 (Ga. Laws 1920, No. 800). P. 473.
2. A statute bearing on the right to an injunction must be given effect by an appellate court though enacted pending the appeal. P. 474.
3. As applied to oil and gasoline in interstate commerce, state inspection fees imposed without the consent of Congress and so clearly exceeding the cost of inspection as to amount to a revenue tariff, are unconstitutional. P. 475.
4. Goods imported into one State from another, which have reached their destination and are held in storage in the original packages awaiting sale, are subject to nondiscriminatory state taxation. P. 475.
5. A tax levied in respect of goods of a particular kind is not to be held a discrimination against interstate commerce merely because goods of that kind are not produced locally but are all imported from other States. P. 476. *Askren* v. *Continental Oil Co.*, 252 U. S. 444.
6. Oil and gasoline imported from another State in tank cars not used for indefinite storage or as distributing tanks for local sales, remain in interstate commerce and not subject without the owner's consent to local inspection fees amounting to taxation until unloaded. P. 477.
7. The Georgia laws, *supra*, provide for inspection of illuminating oil and gasoline and for inspection fees, yielding revenue in excess of inspection cost, fixed at higher rates per gallon for small quantities than for large, and imposed once only, in connection with the

inspection, viz., upon dealers at the time of first domestic sale or during storage preliminary to such sale, and upon persons who buy or bring in these products for their own local consumption, the latter enjoying an exemption from paying more than a specified total annually which does not apply to dealers. *Held*, that the charge, as applied to local transactions, is an excise, and is

(a) Not arbitrary or unreasonable, in violation of the Fourteenth Amendment. P. 479.

(b) Nor contrary to Art. 7, § 2, par. 1, of the Georgia Constitution, which requires uniform valuation of all property subject to be taxed and that all taxation shall be uniform on the same class of subjects and levied and collected under general laws. P. 480.

266 Fed. 577, affirmed.

APPEAL from a decree of the District Court refusing, in part, an application for an interlocutory injunction in a suit brought by the appellant to restrain the appellees, officials of Georgia, from enforcing laws of that State imposing inspection fees, in respect of oil and gasoline brought in by the appellant from other States.

Mr. John M. Slaton and *Mr. Harry T. Klein*, with whom *Mr. James L. Nesbitt*, *Mr. Luther Z. Rosser*, *Mr. Benj. Z. Phillips* and *Mr. Stiles Hopkins* were on the brief, for appellant.

The Georgia legislation is to be construed as providing for inspection and not for a privilege or excise tax. If the inspection fees were intended as a general source of revenue, fairly imposed upon the business of selling oil, it is hardly conceivable that the legislature would have imposed them solely upon the first sale instead of upon every one selling oil and its products.

If the tax be a property tax, it is violative of the provision of the Georgia constitution requiring all property taxes to be ad valorem.

Under this legislation, the privilege of storage occasions no charge against any citizen who stores after inspection; the charge is only against the original importer. The

case is indistinguishable from *Standard Oil Co.* v. *Graves*, 249 U. S. 389.

The right to sell is an integral part of interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 Wheat. 419; *Foote* v. *Maryland*, 232 U. S. 494; *General Oil Co.* v. *Crain*, 209 U. S. 211; *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380; *Neilson* v. *Garza*, 2 Woods, 287; *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158; *Standard Oil Co.* v. *Graves*, 249 U. S. 389; *Schollenberger* v. *Pennsylvania*, 171 U. S. 22; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197; *York Mfg. Co.* v. *Colley*, 247 U. S. 21.

As a tax, the excessive inspection fees constitute an arbitrary and discriminatory burden on interstate commerce. The tax is levied only on the first or original sale of these products and it is admitted in the pleadings that no oil is produced in Georgia.

The tax viewed as an excise or privilege tax is directed against the products of other States because all of such products must come from other States. *American Fertilizer Co.* v. *Board of Agriculture*, 43 Fed. 609. Neither is the tax rendered valid by the fact that it applies to internal as well as external commerce. Discriminatory taxes against articles from other States are void. *Webber* v. *Virginia*, 103 U. S. 344; *Leisy* v. *Hardin*, 135 U. S. 100; *Lyng* v. *Michigan*, 135 U. S. 161; *Welton* v. *Missouri*, 91 U. S. 275. When consignment is made direct to the customer for his own use the oil can not be at any time in intrastate commerce. *Walling* v. *Michigan*, 116 U. S. 446; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1.

The Texas Company is entitled to invoke the protection of the Constitution, whether the tax falls on sales made by it or by its customers importing such oils; the burden on interstate commerce is the same. *Savage* v. *Jones*, 225 U. S. 501; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 328; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292.

The difference between the power of the State to tax goods and an authority of the State to interfere with the introduction and disposal of goods in interstate commerce is clearly drawn in *American Steel & Wire Co.* v. *Speed*, 192 U. S. 522. The power to tax the sale of an article in consummation of its interstate commerce shipment is very different from the power to tax that article together with all other property in the State upon which the burden of a valid law might equally fall. *York Mfg. Co.* v. *Colley*, 247 U. S. 21; (*Askren* v. *Continental Oil Co.*, 252 U. S. 444, distinguished); *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158.

The tax is violative of the Fourteenth Amendment. On its face the imposition of inspection fees amounting to five times the cost of inspection is arbitrary and unfair. It takes the same length of time to inspect 50 gallons as 8,000 gallons of oil, and yet the tax is in proportion to the amount. It is a tax only upon the first sale. It is an arbitrary assessment. *Southern Ry. Co.* v. *Greene*, 216 U. S. 400. As only the first vendor is taxed, the law carefully excludes the citizens of Georgia from the payment of these excessive fees, although engaged in the same business.

Arbitrary selection cannot be justified by calling it a basis of classification. *Royster Guano Co.* v. *Virginia*, 253 U. S. 412; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The tax is violative of the state constitution. *Beckett* v. *Savannah*, 118 Ga. 58.

Mr. Mark Bolding, with whom *Mr. Albert Howell, Jr.*, *Mr. P. H. Brewster* and *Mr. Arthur Heyman* were on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a suit in equity by appellant, a corporation and citizen of Texas, against appellees, both individually and as officers of Georgia, to restrain enforcement of laws respecting fees for inspection of petroleum and petroleum products, especially kerosene oil and gasoline, so far as concerns products brought by plaintiff from other States into Georgia and there disposed of.

The laws in question, as they stood when suit was commenced (March, 1920), comprise provisions found in Georgia Civil Code, 1910, §§ 1800–1814, which originally referred only to illuminating oils; an amendatory Act of August 19, 1912 (Laws 1912, No. 570, p. 149), which extended the inspection system to gasoline; an amendatory Act of August 19, 1913 (Laws 1913, No. 258, p. 110); and certain sections of the Penal Code, 1910. They provide for official state inspection of petroleum and petroleum products; prescribe tests relating to their fitness for use—a flash test for illuminating oils, a specific gravity test for gasoline—and establish inspection fees dependent upon the quantity inspected but at a higher rate per gallon in small quantities than in large, the fees being fixed, however, upon a basis that has been found in practice to yield revenues substantially in excess of the cost of inspection. The officials in charge of enforcement of the system, here made defendants, are the commissioner of agriculture, a general inspector of oils, and numerous local inspectors, whose duties are set forth in the cited code sections and in the Act of 1912. Among other provisions for rendering the acts effective, § 639 of the Penal Code makes it a misdemeanor to sell or offer for sale illuminating fluids in violation of the pertinent provisions of the Civil Code, and § 642, to sell or keep for sale, or in storage, crude or refined petroleum, naphtha, kerosene, etc., without having the same inspected and approved by an authorized inspector.

The federal jurisdiction was invoked both because of diverse citizenship and because the suit arose under the Constitution of the United States. Upon the merits, questions of state law were and are raised, as they may be (*Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508), in addition to federal questions.

Enforcement of the inspection fees was and is resisted upon the ground that they constitute an arbitrary and unreasonable exaction, not sustainable as a fair exercise of the taxing power but invalid as violative of the guarantee of due process of law contained in the state constitution, as well as that in the Fourteenth Amendment.

A more specific objection is that the imposition of the fees is in conflict with Art. 7, § 2, par. 1, of the state constitution, which provides: "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

But the contention most emphasized is rested upon the commerce clause of the Constitution of the United States, the insistence being that inspection fees exceeding the cost of inspection, as imposed upon plaintiff's products, constitute a burden upon interstate commerce. As to this, defendants denied that the laws in question by proper construction applied, or as enforced by the state officers were made to apply, to plaintiff's products while in interstate commerce; they averred that inspections were not required to be made, nor fees to be paid, until after the products had arrived at destination in the State and were held in storage by the consignee for the purposes of sale in the State.

Upon amended bill and answer, and affidavits *pro* and *con*, an application for interlocutory injunction was heard before three judges pursuant to § 266 Judicial Code as amended March 4, 1913, c. 160, 37 Stat. 1013, and re-

sulted in a decision June 28, 1920 (one judge dissenting), pursuant to which an injunction *pendente lite* was granted restraining the collection of inspection fees in respect to kerosene oil, gasoline or other petroleum products of plaintiff brought into the State of Georgia from other States and intended to be sold in the original packages, and so sold; but injunction was refused, and restraining orders theretofore granted were dissolved, as to products brought in for indefinite storage within the State, or for sale after breaking the original package, after completion of the interstate transportation. 266 Fed. 577. An appeal was taken by plaintiff direct to this court, as authorized by § 266 Judicial Code.

The controlling facts are not in dispute. Plaintiff carries on in Georgia an extensive business in the distribution and sale of illuminating oil and gasoline. Neither commodity is produced in Georgia, and all plaintiff's supplies for that State are brought from points in other States, principally by rail in tank-cars owned by plaintiff, having a capacity of approximately 8,000 gallons each. Plaintiff has thirty-four local agencies or distributing stations at different points in the State, at which are stationary storage tanks for oil and gasoline respectively, pumps and other apparatus for transferring the products from tank-car to storage tank, and either a railroad siding, or (in a few cases) a private track in proximity to the storage tanks. Plaintiff also maintains wagons for the delivery of oil and gasoline from the stationary tanks to its customers. The principal part of its products comes to the distributing stations consigned to plaintiff or its manager or agent. As a rule, and as a part of plaintiff's own system, as soon as one of the tank-cars is started from the point of origin outside the State a request for inspection together with a check for the inspection fees is forwarded by plaintiff to the local inspector nearest the point of destination, notifying him that the shipment is en route and re-

questing him to give it immediate attention upon arrival. Upon its arrival the local agent notifies the inspector, who thereupon, in compliance with the previous request, inspects the oil or gasoline by taking a sample from the tank-car, after which its contents are conveyed to and into the storage tank, and then distributed and sold to patrons, either directly from the tank or by means of the delivery wagons. In some instances, involving substantial quantities but only a small proportion of the whole—less than 5 per cent.—plaintiff sells tank-cars of gasoline and kerosene direct to its customers in Georgia, making interstate shipment direct to customer's address.

The majority of the judges held that the provisions for inspection of petroleum products were a permissible exercise of the State's police power; that in so far as the fees yielded revenue in excess of the cost of inspection they were attributable to the taxing power of the State and not objectionable except as applied to interstate commerce, as to which they were invalid; that they were not in conflict with the uniformity clause of the state constitution; that so far as plaintiff's products were indefinitely stored within the State, or sold there after breaking bulk or original packages, they were subject not only to inspection but to the tax imposed, as soon as the interstate transportation was ended; and that the State should be permitted to enforce the inspection fees so soon as the products passed out of interstate commerce, although restrained with respect to products while in such commerce; citing *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411.

After the interlocutory decree and pending the appeal, evidently in view of the controversy raised in this case, the general assembly passed an Act, approved August 17, 1920 (Ga. Laws 1920, No. 800, p. 163), declaring that the laws relating to inspection and tests, and prescribing the fees therefor and the duties of the Commissioner of Agriculture

and general oil inspector and local inspectors, as set forth in §§ 1800 to 1814, both inclusive, of the Civil Code, and in Act of August 19, 1912, and the penalties provided in §§ 639 and 642 of the Penal Code, " shall never be held or construed to apply to oils and gasoline, benzine, or naphtha, or other articles mentioned in said laws, imported into this State in interstate commerce and intended to be sold in the original and unbroken tank cars or other original receptacles or packages, and so sold, while the same are in interstate commerce."

In view of the provisions of this act we need spend no time in discussing whether the judges were right in following the rule of practical separability in administration, applied by this court to a taxing law single on its face in *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, a case followed, since the decision below, in *Bowman* v. *Continental Oil Co.*, 256 U. S. 642. Any question whether the same or a different rule ought to be applied to an inspection law employed for the purpose of revenue taxation, based upon doubt as to the intent of the state legislature to permit the system to remain in force with respect to products stored within the State or sold in domestic commerce, when determined to be unenforceable as to the like goods while in interstate commerce, is set at rest by the new act, which under the circumstances must be accepted as manifesting an intent that the system shall remain in effect as to products that are subject to the taxing power of the State, as clearly as it declares a contrary purpose as to products still remaining in interstate commerce. Although passed after the decree below, this act must be given effect in deciding the appeal, since the case involves only relief by injunction, and this operates wholly *in futuro*. *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464.

That a State is within its governmental powers in requiring inspection, including tests as to quality, as a

safeguard with respect to inflammable substances such as those here involved, when found within its borders, or even when moving in commerce from State to State (there being no legislation by Congress upon the subject), is well settled. *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158, 162. That with respect to such substances when they have passed out of interstate commerce and have come to rest within the State and become a part of the general mass of property or have become the subject of domestic commerce, the State may impose inspection fees substantially in excess of the cost of inspection, and thus make them a source of general revenue, is also free from doubt, other than any which may arise from its own constitution. But a State may not, without consent of Congress, impose this or any other kind of taxation directly upon interstate commerce; and inspection fees made to apply to such commerce, exceeding so clearly and obviously the cost of inspection as to amount in effect to a revenue tariff, are to the extent of the excess a burden upon the commerce amounting to a regulation of it, and hence invalid because inconsistent with the exclusive authority of Congress over that subject. *Standard Oil Co.* v. *Graves*, 249 U. S. 389, 394–395.

Plaintiff makes the broad contention that inspection charges amounting in effect to taxation cannot be imposed even upon that part of its product which has come to rest within the State, or is disposed of in domestic trade, in view of the fact that all of it has come from other States. But *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 520, settles the principle that goods brought into a State, not from a foreign country but from another State, having reached their destination and being held in storage awaiting sale and distribution, enjoying the protection which the laws of the State afford, may without violation of the commerce clause be subjected to nondiscriminatory state taxation, even though still contained

in original packages. This decision is in line with the previous cases of *Woodruff* v. *Parham*, 8 Wall. 123, 140, and *Brown* v. *Houston*, 114 U. S. 622, 632–634; and it was pointed out that their authority was not overruled by *Leisy* v. *Hardin*, 135 U. S. 100, or other cases of like character.

Appellant insists that *Standard Oil Co.* v. *Graves*, 249 U. S. 389, is inconsistent with the imposition of inspection fees on a revenue basis upon goods brought from another State, however held or disposed of in Georgia. That decision, however, extended the exemption from such fees of goods brought from State to State, no further than "while the same are in the original receptacles or containers in which they are brought into the State" (pp. 394-395); and so it was interpreted in *Askren* v. *Continental Oil Co.*, 252 U. S. 444, 449.

Brown v. *Houston*, and *American Steel & Wire Co.* v. *Speed*, *supra*, sustain the power of a State to impose property taxes upon goods brought from another State, after they have come to rest in the taxing State. But this carries equally the power to tax, without discrimination, domestic sales made of personal property similarly freed from interstate commerce, as is illustrated in *Woodruff* v. *Parham*, 8 Wall. 123, 140; *Wagner* v. *City of Covington*, 251 U. S. 95, 102–103, and cases there cited. The fact that no goods of the like kind are produced within the taxing State, and that necessarily all have come from other States, is not of itself sufficient to show a discrimination against interstate commerce. The precise point was dealt with in *Askren* v. *Continental Oil Co.*, *supra*, in that part of the opinion which treated of the excise tax imposed by New Mexico upon retail sales of gasoline, respecting which the court said (pp. 449–450): "A business of this sort, although the gasoline was brought into the State in interstate commerce, is properly taxable by the laws of the State. Much is made of the fact that New Mexico

does not produce gasoline, and all of it that is dealt in within that State must be brought in from other States. But, so long as there is no discrimination against the products of another State, and none is shown from the mere fact that the gasoline is produced in another State, the gasoline thus stored and dealt in, is not beyond the taxing power of the State." The ruling was reiterated in the same case at its final stage, *Bowman* v. *Continental Oil Co.*, 256 U. S. 642.

Something should be said as to the inspection of plaintiff's products, involving liability for fees, while the products yet remain in the tank-cars. A like question raised in *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158, concerning the oil inspection law of that State, was unnecessary then to be decided (p. 164); the court having found the inspection fees there imposed were not shown to be so largely in excess of the cost of inspection as to amount to a tax inadmissible as applied to subjects still in interstate commerce, and hence that they might be imposed while the products remained in such commerce. In this case, the fees concededly being a source of revenue, the question of so adjusting their application as to avoid taxing interstate commerce becomes important.

The practice, uniformly followed with plaintiff's consent, indeed at its request and for its convenience, has been to inspect the oil and gasoline arriving at its distributing stations while remaining in the tank-cars, with resulting immediate liability for the fees; otherwise as to direct deliveries to its customers buying in tank-car lots. In the normal course of the business, as shown by this record, the tank-cars are not only the vehicles but the original containers for interstate transportation, as well with respect to products consigned to plaintiff's own stations as to deliveries made direct to other interstate consignees. Ordinarily, unless a loaded car be used for indefinite storage, or as a distributing tank for local sales

(nothing of either kind appears in the case) it remains in interstate commerce until unloaded, and the agents of the State may not lawfully subject its contents to the inspection charges until transferred to the storage tank, unless with plaintiff's consent. Neither under a fair construction of the Act of 1920, nor (if that permitted) under the Constitution of the United States, may such inspection combined with taxation be imposed as a condition of admitting into the domestic market goods arriving at destination in interstate commerce. The mere fact that a loaded tank-car has been halted upon a siding, or even upon a private track, for the purpose of unloading, at a station either of plaintiff or of any other interstate consignee, does not, under the course of business here shown, amount to a "coming to rest within the State," authorizing state taxation. And although the State may tax the first domestic sale of the products, or tax them upon their storage in stationary tank awaiting sale, it may not, without consent of the owner, impose its power upon the products while yet in the tank-car, but must resort to other means of collection, if need be.

The evidence strongly tends to show that it may be more convenient to plaintiff that inspection before unloading of tank-cars, as heretofore practiced, be continued; and there is no legal objection to this, if done with plaintiff's free consent. Aside from this, the authority of defendants to tax the products or their storage or sale commences when they have come to rest; ordinarily when transferred from the tank-car to the storage tank and added to plaintiff's stock-in-trade kept therein for local distribution and sale.

We interpret the decree below as permitting no interference by defendants with the right of plaintiff freely to carry on its interstate commerce under the Constitution of the United States, as that right is here stated.

That matter being out of the way, plaintiff's objections to the inspection and taxing system as arbitrary and unreasonable, and not a fair exercise of the taxing power, though magnified by confused manner of statement, are easily disposed of. Considering not merely the terms but the practical operation and effect of the statutory provisions, which is the proper method (*St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362), we have here a combined inspection and revenue law applicable to petroleum products, not materially differing in main features (aside from the revenue derived from the fees), from those adopted by other States, and doubtless chosen for facility and economy in operation and equitable apportionment of the burdens according to the benefits. It has a two-fold object, first, that these inflammable substances be not stored or distributed among the people of Georgia without such assurance of quality and fitness as the prescribed inspection and tests may afford, secondly, that charges sufficient to defray the cost, with something additional for the general treasury, be imposed in a way to operate as an indirect tax upon the ultimate consumers of the products, approximately in proportion to the amounts consumed. That it combines regulation with revenue-raising is not a valid objection from the standpoint of the Fourteenth Amendment. *Gundling* v. *Chicago,* 177 U. S. 183, 189. The tax, to describe it according to its essential nature, is an excise upon domestic sale or storage, designed to affect the use of the products, a tax imposed at the time of inspection, the inspector acting also as tax-gatherer; inspection and tax-payment required but once, and that, ordinarily, from the dealer at the time of the first domestic sale, or during storage preliminary to such sale. The self-interest of the dealer and the customs of trade are relied upon to add the tax to the price of the product, and thus pass it on to the

ultimate consumer—a method appropriate in indirect taxation, and certainly a not unreasonable mode of distributing the burden among those who share in the benefits.

That the legislature intended the effect of the tax to fall upon the ultimate consumer is evident, not only from the obviously inevitable result of requiring its payment, ordinarily, by the first domestic seller, but from the specific provisions of the amendatory Act of 1913, that the 1912 Act "shall apply not only to gasolines, benzines and naphthas sold or offered for sale in the State of Georgia, but likewise to all such commodities that may be sold elsewhere and brought into the State of Georgia, for consumption or use. Where such commodities or any of them may be purchased within the State, or without the State and brought into the State, by any person, firm or corporation, not for the purpose of selling or offering the same for sale, but for the purpose of use or consumption by the purchaser in manufacturing or other lawful uses, either as fuel or otherwise, the inspections herein prescribed shall be made, and the fees above fixed shall be paid therefor, except that no such purchaser shall be required to pay more than twelve hundred dollars per year for the inspection of all such commodities used or consumed by him as aforesaid, and such payments may, in the discretion of the Commissioner of Agriculture, be divided into equal monthly payments of one hundred dollars each."

No case is shown for the application of this act; the judges below found no occasion to pass upon it, plaintiff's products not being brought in for its own consumption. In this court there has been no discussion as to its proper construction, plaintiff's counsel insisting merely that it shows the inspection fees are not imposed as a privilege tax for the conduct of any particular kind of business.

Apparently, it was intended to cover the case of large consumers who otherwise might find it advantageous to bring in, and store until needed, quantities of oil or gasoline sufficient for their own consumption, thus escaping dealer's profit and inspection tax as well. We find in its provisions nothing to raise a question about the validity of the system.

We are unable to see in Article 7, § 2, paragraph 1, of the state constitution anything to prevent the application of these statutes to plaintiff's business. The requirement of uniform valuation upon all property subject to be taxed, manifestly refers to property taxes imposed by reason of ownership, which this is not. The clauses requiring that all taxation shall be uniform upon the same class of subjects, and levied and collected under general laws, are not violated by the tax in question. Classification is in terms permitted, and a law based on reasonable classification must be deemed a general law, in the sense of the constitution.

The decisions of the Supreme Court of Georgia hold that, while property taxes must be strictly on an *ad valorem* basis—without variance even as between real and personal property (*Verdery* v. *Village of Summerville*, 82 Ga. 138; *Mayor* v. *Weed*, 84 Ga. 683, 687;)—other subjects of taxation may be resorted to, and the taxes adjusted according to reasonable methods of classification. *Atlanta National Association* v. *Stewart*, 109 Ga. 80, 87. Thus, inheritance taxes, being not a tax upon property but an excise upon the privilege of transfer upon death of an owner, were held valid although not *ad valorem*, in *Farkas* v. *Smith*, 147 Ga. 503, 512.

The peculiar qualities of illuminating oils and gasoline seem to us a sufficient warrant for putting them in a class by themselves for excise taxation upon their sale or use. So we held, in *Bowman* v. *Continental Oil Co.*, *supra*, with respect to an excise upon the sale or use of gasoline, under

a provision of the constitution of New Mexico not differing materially.

While some of the Georgia decisions indicate a rather strict view of the uniformity required (*Johnston* v. *Mayor, etc., of Macon*, 62 Ga. 645; *Beckett* v. *Mayor, etc., of Savannah*, 118 Ga. 58;) we have found none going so far as it would be necessary to go in order to overthrow the inspection tax now in question. That it is imposed, as a rule, only upon the dealer who makes the first domestic sale, not upon those who may make subsequent sales, is consistent with the nature of the tax and the purpose to distribute its burden among those who ultimately consume the product. To impose a like tax each time the commodity changed hands in retail trade might place so heavy a burden upon those purchasing other than at first hand as to render it impossible for the retailer to compete and thus seriously obstruct general distribution. The graduation of the inspection charges according to the quantity that may be inspected at one time—½ cent per gallon in lots of 400 gallons and upwards, 1 cent in quantities between 200 and 400 gallons, 1½ cents in quantities less than 200 gallons—speaks for itself, and plainly is sustainable on the ground that the travel, care, and responsibility of the inspector may be greater than uniform fees per gallon would compensate in the case of the smaller lots. The only other diversity we have noticed in the operation of the tax is that which may arise out of the Act of 1913 entitling a purchaser who buys not for resale but for his own use or consumption, to a limitation of inspection fees to $1,200 per annum. No point is made of this, but a rather obvious ground of classification suggests itself, in that the purchaser for his own use or consumption has no opportunity to make a profit out of resale, as plaintiff and other dealers who pay the full inspection fees may do.

Finally, our attention is called to an Act approved August 10, 1921 (Laws 1921, No. 173, p. 83), providing for an occupation tax upon all distributors selling gasoline and other motor fuels in the State, requiring them to register and make returns, and "(except those importing and selling it in the original packages in which it is brought into the State)" to pay an occupation tax based upon the quantities sold. It is conceded that this does not repeal or affect the inspection laws, and no argument is rested upon it except in support of contentions already disposed of.

The decree of the District Court must be, and it is

Affirmed.